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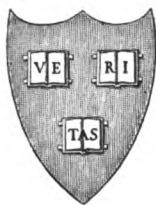
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**LAWRANCE'S
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BEING

**DECISIONS OF THE HIGH COURT AT
CALCUTTA,**

AND

**OF HER MAJESTY'S MOST HONORABLE
PRIVY COUNCIL**

ON

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JUDGES OF THE HIGH COURT.

HON'BLE SIR RICHARD COUCH, *Knight, Chief Justice.*

„ H. V. BAYLEY, (deceased),

„ F. B. KEMP,

„ L. S. JACKSON,

„ J. B. PHEAR,

„ A. G. MACPHERSON,

„ W. MARKBY,

„ F. A. B. GLOVER,

„ D. MITTER,

„ W. AINSLIE,

„ C. PONTIFEX,

„ E. G. BIRCH,

Puisne Judges.

MR. PAUL, *Officiating Advocate-General.*

„ KENNEDY, *Standing Counsel.*

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BENGAL LAW REPORTS.

PRIVY COUNCIL.

KOOER GOLAB SING AND OTHERS (DEFENDANTS) *v.* RAO KURUN
SING (PLAINTIFF).

P. C.*
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July 12.

RAO KURUN SING (PLAINTIFF) *v.* NOWAB MAHOMED FYAZ ALEE
KHAN AND ANOTHER (DEFENDANTS).

[On Appeal from the Sudder Dewanny Adawlut, N. W. P., Agra.]

Hindu Widow—Alienation, Gift by—Reversioner—Practice—Heir—Sister's Son—Act VIII of 1859, s. 7—Mortgage by Widow—Burthen of Proof. See also 13 B. L. E. 72.

By the *Mitakshara*, a male descendant in the fifth degree from the great-grandfather of the *propositus* succeeds to the exclusion of the sister's son.

A Hindu widow executed deeds of gift, in which her late husband's mother, the nearest reversioner, concurred. After the death of the widow, but in the lifetime of the mother, the next presumable reversioner sued to set aside the deeds and for possession. *Held*, that the suit was good so far as it sought to set aside the deeds; and the mother having died before decree, that no objection could be taken to the suit on the ground that the decree gave possession to the plaintiff.

Such suit was held to be no bar to a second suit by the same plaintiff to set aside a mortgage by the widow and the mother of the deceased of a portion of the property which was the subject of the first suit, although in that suit the property was described as subject to the mortgage, and the name of the mortgagee was mentioned. The true test of the application of s. 7 of Act VIII of 1859 is whether there has been a splitting of the cause of action.

The burthen of proving the necessity for a mortgage by a Hindu widow rests on the mortgagee, where that necessity is disputed by the next heir.

The first case was an appeal from a decree of the late Sudder Court at Agra, dated 22nd June 1863, affirming a decree of the Principal Sudder Ameen of Allyghur.

*—Present THE RIGHT HON'BLE SIR JAMES W. COLVILLE, SIR JOSEPH NAPIER, LORD JUSTICE JAMES, LORD JUSTICE MELLISH, and SIR LAWRENCE PEELE.

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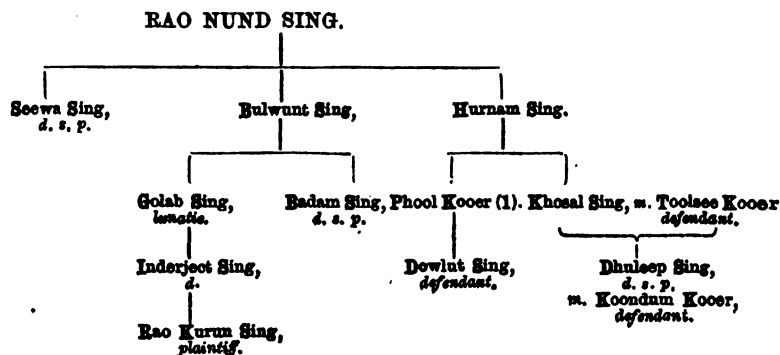
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The suit was brought by the respondent on his own behalf and as heir and guardian of his grandfather, Rao Golab Sing, a lunatic, to set aside deeds of gift made by the widow of one Dhuleep Sing, since deceased, the plaintiff claiming on her death on his own and his grandfather's behalf as next of kin of Dhuleep Sing. He also sought to set aside a conveyance by Toolsee Kooer, Dhuleep Sing's mother.

To the suit he made defendants not only the appellants who claimed under the deeds of gift, but also Toolsee Kooer, the mother of Dhuleep Sing, who survived the widow.

The pedigree relied on by the plaintiff was as follows :—



The issues raised were, first as to the Law of Limitation ; second, as to whether the plaintiff, being removed from the common ancestor by five generations, could sue ; and, third, as to whether the widow could alienate.

All these issues were found by the Principal Sudder Ameen in the plaintiff's favor ; and, on appeal to the Sudder, another issue was raised, as to the plaintiff's right to sue without a certificate of administration to his grandfather under Act XXXV of 1858, which also was decided in the plaintiff's favor.

It is unnecessary to refer to the contentions in the Courts below as to the validity of the conveyances by the ladies, or as to the Law of Limitation, these points not being raised before the Judicial Committee.

Toolsee Kooer, the mother of Dhuleep Sing, died during the suit.

- (1) The appellants contended that Phool Kooer was the daughter of Khosal Sing, and therefore the sister of Dhuleep Sing.

Mr. I. T. Pritchard (Sir R. Palmer, Q. C., with him) for the appellants.—This being a suit for possession, the plaintiff was not entitled to succeed. If entitled at all, he was only entitled as a reversioner, and the suit has been misconceived. But even if he could have sued, he could not sue on his own behalf, and he was not entitled to sue on his grandfather's behalf, save as a duly constituted guardian, and it is shown that he never was so constituted according to law. But without relying on the question raised below as to the remoteness of the plaintiff's descent, a great oversight has been committed by the Courts in India in tracing the succession from Dhuleep Sing. On the death of Dhuleep Sing's widow, his mother succeeded, and putting aside the serious objection to this suit for possession being brought in her lifetime, the succession would on her death be traced from her husband, and not from her son. That husband left a daughter, Phool Kooer (1): and her son, either as the son of the daughter, or, if the succession is to be traced from Dhuleep Sing, as the son of the sister, is entitled; that son is Dowlut Sing. It is said that a sister and her sons are excluded by the law of the Mitakshara, but this is erroneous. The ancient law must be critically regarded in this respect. "To the nearest sapinda, male or female, after him in the third degree, the inheritance next belongs," is the original text of Menoo—3 Col. Dig., s. 484. As brethren are the nearest sapindas, the question arises whether the word "brethren" does not include sisters. Bullum Bhutta interprets it as including sisters—Mitakshara, Ch. ii, s. 4, cl. 1, note. The rule of succession depends on the power to perform the *shrāddh*, and a daughter's son can perform the *shrāddh* in Bengal and Benares; and in Bengal a sister's son can perform it. In the untranslated commentaries, the Nirnaya Sindhoo by Kamaralakara, and the Dhurma Sindhoosara by Kaseenath, a list of those entitled to inherit is given, in which the sister's son is enumerated. These commentators are regarded as high authorities in the Benares schools, and their works, though not translated, are familiar to Sanscrit scholars. The following authorities

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(1) This fact was not admitted: the respondents contended that she was a sister of Kosal Sing.

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were referred to:—*Giridhari Lal Roy v. The Bengal Government* (1) and *Venayeck Anundrow v. Luzumebase* (2), *Strange's Hindu Law*, Ch. vi; Col. Dig., Ch. ii, s. 5, in note.

Mr. Leith and Mr. Theodore Thomas for the respondents.

Their Lordships, finding that the second case, in which the same plaintiff sought to set aside mortgages granted by the ladies, involved the same point, reserved judgment until it was heard, and a joint decision in both cases was given.

It appeared from the plaint in the first suit that certain portions of the property claimed had been mortgaged by the ladies to the respondents in the present suit, but no attempt was made in the first suit to set aside these mortgages. The Sudder Court having decreed that suit in the plaintiff's favour, he now sought to set aside the mortgages as having been made by the widows without necessity, and he relied on the decision in the first suit as establishing his title as heir, and the incompetency of the ladies to alienate the property absolutely.

The defendants contended that the plaintiff's suit was barred by s. 7 of Act VIII of 1859; that the ladies had power to mortgage; and that the mortgages were justified by necessity.

The Principal Sudder Ameen decided all these points in the plaintiff's favor.

The defendants appealed to the Sudder Court (Messrs. Pearson and Spankie), who referred the question as to whether s. 7 applied for the decision of a Full Bench consisting of Messrs. Roberts, Pearson, Spankie and Turnbull.

These Judges differed in opinion, Mr. Pearson being in the minority.

The Three other Judges delivered the following judgment:—

“With reference to the circumstances of this case and the fact that, but for the alienation unlawfully made by the Ranees, the plaintiff would not have been in a position to sue at all, we are of opinion that the avoidance of these alienations must be regarded as the main object of the first suit, and, therefore, as the plaintiff's cause of action.

(1) 1 B. L. R., P. C., 44.

(2) 9 Moo. I. A., 516.

The plaintiff sued to obtain right in, and obtain possession of, seventeen villages by cancelment of certain instruments of gift and sale. The seventeen villages included those which form the subject of the present suit. The plaintiff, however, omitted to implead the mortgagees in possession of those villages, or to sue for the avoidance of their deeds. Looking at the alienations as the cause of the plaintiff's action, we are not prepared to admit that their permanent or temporary character would leave it optional with plaintiff to include them in, or exclude them from, his former suit. Each alienation, permanent or otherwise, was *prima facie* equally unlawful, and constituted a cause of action. But when the plaintiff elected to sue for the whole of the property at once, and to avoid the alienations which jeopardized it, he was bound to sue for the cancelment of all the alienations, which gave him a common cause of action.

If the mortgages were a portion of the plaintiff's claim arising out of the cause of action, then the words of s. 7, Act VIII of 1859, are imperative: 'Every suit shall include the whole of the claim arising out of the cause of action,'—and this has been the rule and practice of our Courts in regard to claims of inheritance for twenty-seven years.

It is admitted that the plaintiff might have impleaded the mortgagees in his first suit. His not having done so must be considered an omission: and a suit for a portion of a claim omitted cannot afterwards be entertained. The plea, therefore, of the defendants, that the plaintiff, not having sued to avoid their mortgage-deeds in his first suit, must be regarded as having acknowledged them, is a good one, founded as it is on the provisions of s. 7, Act VIII of 1859. With this view, therefore, of the case, we hold that the plaintiff was not at liberty to bring this suit, regarding which our opinion has been asked, and we return the record to the referring Judges for disposal accordingly."

Mr. Pearson, in giving judgment, said:—"I differ from my colleagues, and concur with the lower Court in the opinion that, in separately instituting a suit for the avoidance of the deeds of sale and gift by which the widow and mother of the

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late Dhuleep Sing had absolutely alienated his estate, and suits for the avoidance of mortgages made by the Ranees aforesaid, there has been no splitting of a single cause of action on the part of the plaintiff. In point of fact, such alienation, whether of a permanent or temporary nature, constituted a distinct cause of action, and was a matter to be tried on its own independent merits, as a Hindoo widow is not under all circumstances incompetent to alienate her husband's estate, but is only restricted in alienating it by certain conditions. The link which necessarily connected together all the alienations by sale and gift, so as to render them the proper subjects of one suit for their avoidance, was not their common illegality, for some of them might have been found to have been valid, but the circumstance that the *mauzas* so alienated were the component parts of an estate, of which the plaintiff claimed the whole by right of inheritance; therefore, it happened that the *mauzas*, to which the present suits relate, were included in the former claim, although the mortgagees were not impleaded in that suit. The question whether a mortgage-debt was legally incurred, is one quite foreign to the question whether the plaintiff is entitled to a particular estate by right of inheritance. For the effectual decision of the latter, it was requisite for him to implead the parties to whom any portions of that property had passed *in toto*. But the rights of the mortgagees were perfectly consistent with his proprietary title, and needed not therefore to be disputed or determined in connection with the latter. An heir who succeeds to an estate partly consisting of, or encumbered with, debt, is not bound to sue all the debtors at once for the purpose of recovering or repudiating the debt, merely because they relate to his inheritance, although he is bound, in suing for the estate itself, to sue all adverse claimants in possession. For these reasons, I think that the plaintiff's suits for the avoidance of the mortgage-deeds executed by the Ranees are not barred by s. 7, Act VIII of 1859, and ought to be disposed of on the merits."

The majority of the learned Judges having thus decided that the plaintiff's suit was barred, the suit was dismissed without going into the merits of the case.

The plaintiff appealed.

Mr. Leith and Mr. Theodore Thomas for the appellant:

Sir *B. Palmer*, Q. C., and Mr. *I. T. Pritchard* for the respondents.

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Their LORDSHIPS delivered the following judgment in the two cases :

Their Lordships, in delivering their judgment in these two cases, will begin with that which was first argued, namely, the case of *Koer Golab Sing v. Rao Kurun Sing*.

The plaintiff in the suit, and the respondent in this appeal, sued in the Zillah Court of Allygurh, in the North-West Provinces, as heir of one Dhuleep Sing, to set aside certain alienations of the immoveable estate, that had been Dhuleep Sing's up to the time of his death, made by his widow, who succeeded to the estate as his heir. The defendants were respectively the persons claiming under these alienations, and the mother of Dhuleep, who had concurred in them. The mother survived the widow, and was entitled, at the death of the latter, to succeed as heiress to her son Dhuleep. The Zillah Court decreed the suit in favor of the plaintiff. At the date of the decree, the mother was dead, but she was alive at the time of the commencement of the suit.

The plaintiff and Dhuleep were descended from a common ancestor. The plaintiff was fifth in degree, counting from that ancestor. In this line was his grandfather, who still lived, but was a lunatic at the time of the institution of suit, and at the time of Dhuleep's death. The plaintiff's father was then dead. On appeal to the late Sudder Dewanny Adawlut at Agra, that Court affirmed the decree. From that decision this appeal is now brought.

On the argument of the appeal, nothing was addressed to the Court on the facts to show that these alienations were valid, but the whole argument was addressed to the competency of the plaintiff to question them. The learned Counsel for the appellant objected that, at the time of the suit, the plaintiff was not entitled to the possession, and that the suit was one for possession; that he sued as guardian of his grandfather, and

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that he was not duly so constituted : and, lastly, that he had shown no title as heir.

As to the first objection, the answer is that this suit in its main object was brought to set aside certain alienations ; and that as the nearest reversioner at the time when they took place was charged as concurring in them, the next presumable reversioner was entitled to question them, and the pendency of her life was not a fatal objection to the institution of the suit so far. And as it appeared that, when the decree gave him possession, he was then entitled to possession, the objection on this point resolved itself into one of form, not affecting the real merits of the case.

As to the second objection, there are two answers to it,—first, that the grandfather was not the heir, but the plaintiff ; and that, if the latter had been obliged to sue on the grandfather's title, the objection also would have been one of form, and not affecting the merits of the case. The objection to the plaintiff's title as heir, which was taken in the Court below, on the ground of his remoteness from the common ancestor, was plainly untenable, and was not here insisted on. This objection, as taken below, necessarily assumes the plaintiff to be claiming as heir to the son : and to urge on the hearing of the appeal for the first time that the real title of heirship must be derived from the mother, and not from the son, was to start a new ground of objection to title, which the plaintiff had had no opportunity of meeting in the Court below. The same objection also applied to the argument which was addressed to their Lordships, that a sister may inherit to a brother, and that that line of descent, through the assumed sister from the brother, was not exhausted by the plaintiff's proof. To admit such a line of argument would be also to expose the plaintiff to objections which, had they been raised below, might have been answered from what was known to be the law of the district, and, by the want of proof that the person claiming to be the son of a sister, did in fact stand in that relation to the *propositus*. It will be found from the judgment of the Sudder Court that what the Court understood to be the questions raised before them, and the sole issues raised before them, were, first, "Should the

plaintiff's cause of action be held to have arisen on the death of Dhuleep Sing, or of Koondan Koor, and is the suit within time or not? Second, was Koondan Koor competent or not to alienate the property in question? Third, is the plaintiff so nearly related as to be entitled to inherit?"

Again, the argument at the bar that the plaintiff was not the heir, but that the person who appears in the pedigree, and who was a defendant on the record, was a nearer heir of Dhuleep, depends first upon proof that Dhuleep was the sister's son and next of course, upon the point of law whether the sister's son is capable of inheriting. That it is by no means clear that Dhuleep was the sister's son, would appear from the statement which precedes the judgment of the Sudder Court, in which the Judges say that "in 1856, 'Mussamut Toolsee,' that is the mother, "is said to have likewise executed a *hibbanamah*, bestowing *Mauza Mohoodkhera* on her husband's sister's son Dowlut, and her own nephew Buldeo," there treating Dowlut, not as the sister's son, but, in fact, as the aunt's son. There was, therefore, no real proof before the Court of the relationship of this party to the *præpositus*; and if there had been such a proof, then, inasmuch as the point was not taken in the Court below, there was nothing whatever to show that the law would not have been as it is contended to be, namely, that that person was not entitled, under the law of the Mitakshara, to inherit. There was nothing to show that the interpretation of the ancient text of the law on which Mr. Pritchard relied, even assuming the relationship to be made out, did obtain in the North-West Provinces; and there is every reason to suppose from what has taken place in this case that it has not been received there. The silence of the defendant, supposing him to be in that degree of relationship which it is asserted he was, and of the Court on this point, would be inexplicable on any other hypothesis. Moreover, it is clear that the sister and her descendants find no place in the tables of succession according to the law of the Mitakshara, which have been framed by several persons of authority, and in particular by that eminent Hindoo lawyer, the late Prosunno Keomar Tagore. The learned Counsel for the appellant seemed indeed to concede this, and to admit that the exclusion did prevail in

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fact, but he contended that it had its origin in error, and pleaded for a return to what he contended was the correct interpretation of the texts, founding himself chiefly on the authority of Bullum Bhutta. But it is entirely opposed to the spirit of the Hindu race to allow the words of the law to control its long received interpretation, as practically exhibited by rules of descent and rules of property founded on the decisions of the Courts of the country, and it seems to their Lordships that it would be extremely mischievous to disturb, upon points taken here for the first time, any such course of decision.

Their Lordships, therefore, see no ground whatever for disturbing the decisions of the Courts below in this case, and will humbly advise Her Majesty to dismiss the appeal with costs.

In the other case two questions were raised: the first upon the decree of the High Court, which dismissed the suit of the plaintiff, the appellant in this case, upon the ground that the case fell within the 7th section of Act VIII of 1859, which says that "every suit shall include the whole of the claim arising out of the cause of action, but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. If a plaintiff relinquish or omit to sue for any portion of his claim, a suit for the portion so relinquished or omitted shall not afterwards be entertained."

Their Lordships think that the true test of the proper application of this section to any particular case must be whether there has been a splitting of the cause of action: and it is therefore necessary to consider what in each of these two suits was the cause of action, and whether the second suit can be said to have been brought upon a splitting of that cause of action.

Now, the first suit, as has already been shown, was brought against various defendants to impeach certain alienations made by the widow and mother of Dhuleep Sing. They were alienations by which the inheritance, subject to the interests of those persons, was transferred to certain foster-sons, or near relations, or dependants of the two ladies, so as to exclude the remoter heirs. The suit with which their Lordships are now dealing was brought to set aside and impeach a mortgage which had been granted by the ladies to the respondent in this case before the alienations

which were the subject of the other suit. It no doubt appears in the description of the property, which was the subject of the first suit, that three of the villages forming part of that property were subject to the mortgage now in question, and the name of the mortgagee is mentioned. But it appears to their Lordships that the causes of action in the two cases were essentially different; in the one case the widows, assuming an absolute power of disposition, had granted the inheritance in portions of the estate to the defendants in the first suit. In the other case, the issue was whether they had duly exercised the limited power, which belongs to a Hindoo female having a Hindoo female's right of inheritance in the estate, of charging the estate for certain defined purposes.

The only ground upon which it can be plausibly contended that these two claims against distinct persons and of a very distinct nature really form parts of one cause of action, is founded upon the circumstance that in the first suit the defendant sued for the possession of the lands: the argument being that these mortgagees being parties then in possession, the suit for possession of the lands ought to have contained a prayer for setting aside the mortgages. It is, however, to be observed that the suit, though in form a suit for the possession, was not properly brought, and could not properly be brought at the time it was first instituted for that purpose. The prayer for possession was, of things had remained as they were when the suit was first instituted, one which could not have been granted. But the substance of the suit really was, as has been stated in the judgment delivered in the other case, to have those alienations of the inheritance, which, if not impeached, would have been fatal to the claim of the plaintiff as reversionary heir, set aside and declared invalid. That object was, as their Lordships think, perfectly distinct from that which is the object of the present suit, which is to have these mortgages declared invalid as against the person who has in the former suit established his title to the possession of the estate as heir, on the ground that they were securities which those who granted them had not the power to grant as incumbrances upon the inheritance.

That being so, their Lordships have next to consider whether,

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the decree of the Sudder Court being incorrect upon the sole point on which it proceeded, there are sufficient grounds before them for affirming the decree of the Principal Sudder Ameen.

The case made is that this mortgage was granted by the widows, and that it was not within the power of a Hindoo widow to grant it, the money not being raised for any of those purposes for which the widow is allowed to pledge the estate. In such a case, whatever be the precise degree of proof required from those who rely upon the mortgage, there is no doubt that those who take such a security from a person having only a limited power to grant it are bound to show, *prima facie* at least, that the money was raised for a legitimate purpose. The defendants accordingly plead:—"The real circumstances of the case stand thus:—Musamuts Koondun Koorer and Toolsee Koorer, the heirs in possession of the entire property left by Rao Dhuleep Sing, borrowed Rs. 13,000 from our ancestor under the necessity of liquidating the debt due from the deceased, and that incurred on account of his funeral ceremonies performed for the benefit of his soul, and in lieu of this sum they mortgaged the three villages in dispute to him, and thus saved the property." Upon that pleading it is to be remarked that no distinction is made between any of the items making up the Rs. 13,000; that the defendants pledged themselves to the borrowing of the whole sum for purposes therein mentioned; and that, in those purposes, it is not very distinctly stated that any part of the mortgage-money was borrowed for the purpose of saving the estate by paying an arrear of Government revenue. The case made at the bar to-day, however, is that the mortgage is at all events partially good, inasmuch as Rs. 3,000, part of the claim, was unquestionably borrowed for the purpose of saving the estate from a Government sale.

In all these cases it is to be expected that those who have to support the affirmative of such a case, should give some clear testimony by witnesses as to the nature of the transaction: and it is very remarkable that in this case the oral testimony on the part of the plaintiff is so entirely worthless that neither of the learned Counsel for the appellants thought fit to refer to it. That some evidence as to the nature of the transaction might have

been given one would have supposed, because although the respondents are the children, or remoter descendants of the original mortgagee, still, in those proceedings which have been relied upon as showing what the nature of the transaction was, and in particular as to the alleged bond for Rs. 8,000, it is stated that it was taken in the name of Kullian Dass, cashier of the respondent's ancestor. Kullian Dass is not proved to be dead, nor is the absence of his testimony at all accounted for. There is really no evidence from any trustworthy person whatever, employed in the family of the defendants, as to what the real transaction was. In lieu of that, we are referred to the various proceedings which have been read and relied upon by Sir Roundell Palmer. But what is the documentary evidence, if evidence it can be called, as to the Rs. 3,000, which is in fact the only item on which any substantial question seems to arise? It is the document at page 12. That is a plaint filed in a suit brought by the mortgagee against the two women, the widow and the mother of Dhuleep Sing, seeking to be maintained in possession as mortgagee. The account that it gives of the transaction is this:—"The plaintiff files a regular suit in this Court against Mussamat Toolsee Koor, the mother, and Koondun Koper, the widow, of Dhuleep Sing, the proprietors of Pergunnah Barowlee, to be maintained in possession as mortgagee, by insertion of his name as such in the revenue records of this district, and by allowing him to pay the Government revenue in respect of *Mauza Fuzulpoor*, in Pergunnah Barowlee, assessed at Rs. 506, and to recover Rs. 328, the interest up to the end of the month of Jyestee 1254 Fuslee as well as Rs. 242, the mesne profits for the rainy season crop for 1255 Fuslee, which the defendant has forcibly realized from the lessees of the village, notwithstanding her having already given up its possession to plaintiff, according to the terms of the registered deed of mortgage dated 30th July 1846, engrossed on stamp paper, which is the basis of this action. Total value of suit, Rs. 1,076. He founds his claim on the assertion that, on the demise of ~~Kao~~ Dhuleep Sing, the proprietor of the talook of Barowlee, the aforesaid defendants became his heirs; and as owners of the entire talook and all

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other property left by him, and in the certificates of deth filed in the revenue department in respect to every one of the villages forming the zemindari of the deceased, the names of the ladies were entered as his successors." That mutation of names took place, as is shown by the proceeding of that date, on the 22nd February 1847 ; and on the face of the proceeding, as well as by evidence which has been given in the cause, it appears that the proceeding was one which followed upon certain litigation between the widow, who was the immediate heir according to the Hindoo law, and the mother, who contested her title, which at last ended in a compromise, whereby one took two-thirds, and the other one third of the estate. This plaint goes on to state:—" They then, for the payment of the Government revenue, asked the plaintiff for a loan, and, according to their request, he lent them Rs. 3,000." Certainly the inference one would draw from this statement is that the loan was a joint transaction ; that it was subsequent in date to the determination of the litigation by the compromise and the insertion of the names of the two ladies as the registered owners of the talook.

Then, again, this deed, which is said to have been executed by them, and to have been registered on the 3rd of August 1846, which is a date not quite reconcilable with what has just been said or with what one would infer, is not produced. Neither that, nor the mortgage for Rs. 13,000, has been produced. And their Lordships, looking at this documentary evidence on which the respondents rely, and contrasting it with the account given by the witnesses for the appellant, think that the case deposed to by the witnesses for the appellant, to whom credit was given by the Principal Sudder Ameen, is for more likely, than anything which has been alleged on the other side, to be a true account of the real transaction. They are clearly of opinion that the respondents have failed to support that burden of proof, which the law casts upon them, of showing that the mortgage was given in any part for purposes for which the widow was entitled to pledge the estate.

Their Lordships will, therefore, humbly advise Her Majesty that this appeal be allowed ; that the decree of the High Court be reversed ; and that in lieu thereof a decree be made dismiss-

ing the appeal to the Sudder Court, and affirming the decree of the Zilla Court with costs. The appellant in this suit, and the respondent in the other suit, must have the costs of both the appeals.

First appeal dismissed ; second appeal allowed.

Agent for appellant : Mr. Wilson.

Agents for respondents : Messrs. Cunliffe and Beaumont.

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 GOLAR SING
 v.
 RAO KURUN
 SING.
 —
 RAO KURUN
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 v.
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 FIYAZ ALEE

P. C.*
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 July. 17.

**OKOOR PERSAUD BUSTOORRE (PLAINTIFF) v. MUSSAMUT FOOL-
 KOOMAREE DABEE (DEFENDANT).**

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Act XIV of 1859, s. 1, cl. 9—Del credere Agent—Breach of Contract.

Where a broker was sued for a balance of account, his liability being based on the receipt of a *del credere* commission, held that the suit was for breach of contract within the meaning of cl. 9, s. 1 of Act XIV of 1859 (1), and the period of limitation must be calculated from the date of the last item in the account. The contract not being in writing, the suit, which was brought more than three years from such date, was barred.

THIS was an appeal from a decision of the High Court (Peacock, C. J., and L. S. Jackson, J.), dated the 24th January 1867 (2).

The suit was instituted by the appellant as the gomastah of the *kothee* of Lalla Bunsheedhur against the respondent, who carried on business as a commission agent, or factor, in succession to her husband, to recover the Sum of Rs. 16,000 as the balance of an account current between the two firms.

The alleged liability of the defendant was based upon her having received a *del credere* commission for the sale of goods,

* *Present*.—THE RIGHT HON'BLE SIR JAMES W. COLVILLE, LORD JUSTICE JAMES,
 LORD JUSTICE MELLISH, AND SIR LAWRENCE PEARL.

(1) See Act IX of 1871, Sched. II, No. 115. (2) 7 W. R., 67.

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MAHEE
DARRE.

and not on the ground of her actually having received the money for the goods.

Although the suit was commenced as upon an account stated shortly before action, the plaintiff, at the settlement of the issues, abandoned that and sued for an adjustment of the accounts, but on the trial she relied on evidence of an account stated in September 1858.

The plaint was filed on the 17th July 1863, the last item of charge against the defendant being in September 1858.

The High Court held that the suit was within the scope of, and barred by, cl. 9 of s. 1 of Act XIV of 1859.

Mr. *Leith*, for the appellant, contended, that this was a case in which the accounts showed charges against the defendant for goods supplied to her; and payment received from her, and some such payments appearing in an account stated within three years, s. 8 of Act XIV of 1859 applied, there being an account current between the parties as merchants and traders having mutual dealings. He cited Chitty on Contracts, 7th edit. p. 722, and referred to the English Statutes, 21 Jac. I., c. 16, s. 3, and 19 & 20 Vict., c. 97, s. 9. These constitute current accounts; see 2 Wms' Saund, 127a, note f. This is not a breach of contract within the meaning of s. 1, cl. 9 of Act XIV of 1859. The cases decided in the Courts of India are conflicting—*Sonatum Gooko v. Parbutty Churn Roy* (1) and *Gopal Chunder Shaha v. Sinaes* (2).

Mr. *Doyle*, for the respondent, contended, that there was clearly a breach of contract, and not a case of mutual dealing—*Lal Mohun Halder v. Mahadeb Kates* (3). Though there have been conflicting decisions in India, there can be no doubt as to a selling under a *del credere* commission that there is an express contract under which the agent is liable whether he sell or not.

Their LORDSHIPS gave the following judgment:—

This was a suit brought by the appellant, who was the manager of a factory in Moorshedabad, against the respondent.

(1) Thom. Law of Limit., 129.

(2) 8 W. R., 4.

(3) 9 W. R., 103.

ent, who carried on an old established business of broker, to recover a sum of Rs. 16,051 and interest, alleged to be due on the balance of an account. The defendant had for several years sold the goods of the plaintiff's firm, and according to the finding of the principal Sadder Ameen, the correctness of which was not disputed before us, had received a *pakkā* or *del credere* commission, which made her liable to the plaintiff for all goods sold which were not paid for by the purchasers. As there was no proof that any part of the price of the goods, in respect of which this suit was brought, had been received by the defendant the claim against the defendant, was only supported upon the ground that, as she received a *del credere* commission, she was liable for the price of all goods sold by her for the plaintiff. It was admitted that the cause of action for the last item in the account had accrued more than three years, but that there were items in the account which had occurred within six years from the commencement of the suit. The Statute of Limitation was pleaded, and the sole question to be determined is whether, under the circumstances previously stated, the suit is barred by the Indian Statute of Limitations, Act XIV of 1859. The High Court held that the case came within cl. 9 of s. 1 as a suit brought for the breach of a contract, and the Chief Justice in giving judgment says:—"Although no express contract was proved to have been entered into between the parties, still their dealings were evidence from which it might properly be assumed they had agreed to carry on business on the terms upon which we find them carrying it on." It was an engagement on the part of the defendant that she would sell the plaintiff's cotton, and that she would guarantee the purchasers. There was a liability on the part of the defendant not arising from a ~~wrong~~, but a liability arising out of an engagement which she must be assumed to have entered into with the plaintiff. It therefore falls within cl. 9 of s. 1. It is a suit for a breach of contract not in writing. It was urged before us on the part of the appellant that the High Court had put a wrong construction on the words "breach of any contract," as used in the clause; that these words are not there used for the purpose of distinguishing actions founded on contract from actions founded

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v.
MUSAMUT
FOOLEOO-
MAREE
DABER.

on tort, but for the purpose of distinguishing actions to recover unliquidated damages for breach of contract from actions to recover debts ; and that the enumeration in the clause itself and in cl. 8 of several debts, with respect to which the period of limitation is to be three years, proves that it could not have been intended to make the limitation for all debts three years under the words "suit for the breach of any contract ;" and that the present suit was in substance a suit to recover a debt or liquidated sum of money ; and that the period of limitation was six years under cl. 16 of s. 1. Several cases were cited from the Indian Courts, and it appears from them that much difference of opinion has prevailed among the Judges in India respecting the proper construction to be put on the words "for the breach of any contract" in the cl. 9. Their Lordships do not think it necessary or advisable that they should attempt on the present occasion to lay down what is the proper construction of these words as applicable to all cases. It is sufficient to say that it appears impossible to them to put so narrow a construction upon them as not to include the case now before them. The real debtors for the price of the goods sold are the purchasers of the goods, and the broker is only sued upon his collateral undertaking that, in consideration of the commission paid to him, he will pay the price of the goods if the purchaser fails to do so. An action on such an undertaking is an action on an express contract, and the sums which can be recovered under it are damages for a breach of contract.

Their Lordships, therefore, are of opinion that the judgment of the High Court was correct, and they will recommend to Her Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

Agents for appellant : Messrs. Woolaston and Davison.

Agents for respondent : Messrs. Bailey, Shaw, Smith, and Bailey.

**JUGGUTMOHEENEE DOSWE, MOTHER OF RAJENDRONATH DUTT,
AND OTHERS (PLAINTIFFS) v. SOKHEEMONEE DOSEE AND OTHERS
(RESPONDENTS).**

[On appeal from the High Court of Judicature at Fort William in Bengal.]

*Religious Endowment—Dewatrá—Trust—Burthen of Proof—Limitation—
Act XIV of 1859—Act XIII of 1848*

P. C.*
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In 1818 certain lands were dedicated by deed to the religious service of an idol, and in 1830 that dedication was confirmed in a partition-deed. The plaintiff sued to set aside alienations of the property and to have the trusts of the dedication-deeds declared. The holders of the property alleged that a subsequent partition-deed had been executed in 1845, and that the dealings of the family had shown an intention to revoke the trusts. *Held*, that it lay upon the holders to prove the revocation of the trust, and that, on failure to do so, they could not set up the law of limitation in answer to the plaintiff's suit.

This was an appeal from a decree of the High Court (Kemp and Campbell, JJ.), dated the 15th April 1863, affirming a decree of the Judge of East Burdwan of the 30th March 1860.

The facts of the case and the evidence were (except that the lands, the subject of dispute, were different and lay within another jurisdiction) similar to those of the appeal of the present respondents, other than the respondent Kaleedass Chunder, which was dismissed by Her Majesty in Council on the 19th December 1869 (1).

In that case the present respondents, other than Kaleedass Chunder, sued to recover possession of four-fifths of certain lands, lying within the jurisdiction of the Civil Court of Zillah Beerbhoom, from the original plaintiff in this suit, since deceased Hurreenath Dutt, the predecessor in estate of the present appellants, and his lessees and vendees of parts thereof. They alleged that the lands which had been dedicated to religious purposes by

**Present* :—SIR JAMES W. COLVILLE, SIR R. PHILLIMORE, SIR M. SMITH, AND
SIR LAWRENCE PEEL.

(1) 4 B. L. R., P. C., 16.

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deeds dated in 1813 and 1820 were ostensibly given to the father of Hurreenath for his own use by a partition executed in the Bengal year 1229 (1822) by the five brothers who then represented the joint family, but that they had in fact not passed to him, but had continued to be joint down to the Bengal year 1245 (1838), when a second *bond fide* partition was made, and the lands were given in *devatrà* and set apart for the maintenance of the worship of the joint family idols. The plaintiffs asked in that suit, on the ground of the first partition having been inoperative, and the second operative, that, as to their four-fifths in the lands so dedicated, the leases and sales effected by Hurreenath should be set aside, and possession given to the plaintiffs. Hurreenath the defendant in that suit, asserted that the first partition was in all respects *bond fide*, and had been acted on as such, and that the alleged second partition was a mere fraudulent device and fabrication. The following are extracts from the judgment in that case of their Lordships of the Judicial Committee:—

“The second and third issues are, whether the partition took effect in 1229 (1822) or 1245 (1838)? Whether the disputed villages were given in *devatrà* or not?

“The plaintiffs’ case assumes, and assumes rightly, that a valid partition acted on would render the second deed inoperative. A Hindoo family consisting of persons in this near connection may re-unite, part also may re-unite and such re-united members may impress on their united property, by common family consent, such trusts as their law will support: but neither of these cases is that before your Lordships.

“The burden of proof is on the plaintiffs. The deed of 1229 (1822) has the ordinary legal presumption in its favor that it is honest, and is, what it purports to be, a deed of partition. It is also prior in time. It is *prima facie* a good and operative deed. It cannot be got rid of except by the establishment of a case by the plaintiffs, as part of their proof which involves all the family at that time, including those under whom they derive title in the perpetration of a gross fraud. The deed of partition is declared by their pleading to have been designed for the express purpose and object of defeating creditors.

It is however said in the pleadings not to have been acted on. It is not clear in what sense this phrase is used, unless it be that all outward acts of the family in acting upon it disguised an inward design at variance with that which their actions declared. There is the most abundant, and indeed uncontradicted, proof that this deed was, by Hurreenath and his vendees, produced, established and made the subject of various decrees. It is unnecessary to state the instances of this which were brought to the notice of their Lordships by Sir Roundell Palmer in his exhaustive argument. Mr. Field, in reply, did not deny that such was the case in numerous instances; but he answered that these acts were all the natural and premeditated results of the original device; that as it was a deed to defraud creditors, it would of course be used as such, and that such proof did not exclude the supposition that it might be considered *inter se* by the members of the family as a mere writing, working no change of property amongst them. Without expressing any opinion upon the question whether a plaintiff, supporting his case against those in possession, whom he seeks to evict, can be admitted to allege the inoperative character of an instrument by which recovery would otherwise be barred, on the ground of a fraud in its concoction, to which all from whom he derives title are parties, their Lordships, treating the question as one unaffected by such estoppel, and one simply of evidence arising on the facts, have to observe that, as all these public acts would equally attend the enforcement of an honest and valid deed of partition, when the estates derived under it are assailed, or rights derived under it have to be enforced, they furnish of themselves no evidence of *mala fides*, and should be rather ascribed to the character given to the deed by the defendants than to that imputed to it by the plaintiffs.

"Their Lordships, therefore, are of opinion that the issue, whether the partition took place under the deed of 1229 (1822) or that of 1245 (1838) should have been found in favor of the respondents, which finding should, in their Lordships' opinion have been followed by a corresponding finding on the third issue whether the villages were given in *devatra*, or that they were not so given."

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IENNEE DOSEE
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In the present case Hurreenath Dutt was the plaintiff, and the plaintiffs in the other suit defendants, and the suit was with the object of getting rid of various alienations by, and dealings of, certain of the defendants, supported by the other defendants, with certain other lands situate in East Burdwan, which had admittedly, by the partition of 1229 (1822) and previous instruments of dedication which that partition confirmed and gave effect to, been set apart for the maintenance of the joint family worship, and to have the plaintiff's share in those lands so dedicated made over to him to maintain *pro tanto* the family worship. The defendants' answer set up precisely the same case as their plaint in the other suit,—*viz.*, that the partition of 1245 (1838) had altered the disposition of the family property made by the partition of 1229 (1822), and the previous endowment deeds, and that the properties, the subject of suit, though dedicated by the first, had been desecrated by the second partition, and passed thereunder to two of the defendants for their separate use. The issue was thus the same in both suits,—*viz.*, whether the partition took place in 1229 (1822) or 1245 (1838); but in details, and as regards the interest of one defendant, who claimed as purchaser and set up that the suit was barred by the law of limitation, the cases present some minor differences which render desirable a somewhat fuller statement.

The present suit was instituted by Hurreenath Dutt, on the 2nd of March 1857,—*i.e.*, about five months after the institution of the other suit in which he was defendant,—against the defendants Sokheemonee Dosee, Brojonath Dutt, Bykuntanath Dutt, Bindoobaseenee Dosee, Puddabuttu Dosee, who represented four out of the five brothers who had originally formed the joint family, and Kaleedass Chunder and Ramruttan Mitter, alleged alienees of lot Pilkhundee. The subjects of the suit were, first, the lands of lot Pilkhundee; second, certain *lakhirāj* lands detailed in the schedule to the plaint; third, the surplus proceeds of sale of lot, Mohunpore, which had been sold for arrears of revenue, and which the plaintiff alleged had been received and appropriated by the defendant Sokheemonee; and fourth, the ornaments and furniture of the idols.

The present appeal was confined to the first and second subjects.

—*vis.*, Pilkhundee and the *lākhirāj* dedicated lands,—it having been found by the Courts below, and, as it was admitted, correctly, that the evidence was insufficient to establish a charge of waste or breach of trust against the defendants as to the third and fourth subjects of claim.

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As to Pilkhundee and the *lākhirāj* lands, the plaintiff prayed that, as they had been, by the partition of 1229 (1822), and the previous deeds of dedication of 1220 (1813) and 1227 (1820), validly dedicated and entrusted to the management of the deceased husband of the defendant Sokheemonee Dosee, Manickram Dutt, as *sebat* on behalf of the joint family, on whose death they had come to her as his widow impressed with the same trusts, and as she had subsequently repudiated the trust, and asserted her own separate rights as to the *lākhirāj* lands which, on their being resumed by the Government as invalid *lākhirāj*, had, on her application, and contrary to the objection of the plaintiff, been re-settled with her as her own; and as the defendant Puddabutty, the widow of the deceased Gopeenath, the youngest brother of the four brothers of Manickram, had set up certain fabricated and false conveyances of Pilkhundee, by the last of which it purported to have passed to the defendant Kaleedass Chunder, a stranger to the family, from the defendant Ramruttun Mitter, an alleged purchaser from Puddabutty, who was again alleged to have purchased the said lot with her *stridhan* from her husband Gopenath (to whom it was alleged to have passed as his separate property under the second partition), the said illegal and fraudulent dealings by the defendants, with the joint endowed property, should be set aside, and possession should be given to the plaintiff of his share, *viz.*, one fifth of those properties, he being "willing to conduct in person the *sebat* business to that extent."

The defendants, Sokheemonee, Puddabutty, Brojonath, and Bykuntanath, put in a joint answer, by which they, admitting the *factum* of the earlier deed of partition and deeds of endowment, and that, under those deeds, Pilkhundee and the *lākhirāj* in dispute had been dedicated, as stated by the plaintiff, alleged that, by the second partition deed of 1245 (1838), the earlier disposition of those properties had been done away

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with, and Pilkhundee had fallen to the share of Gopeenath, who had sold it to his wife, the respondent Puddabutty, for a consideration paid out of her *stridhan*, and that she had, on the 25th of Falgoon 1248 (March 1842), sold to the defendant Ramruttun Mitter, who afterwards sold to the defendant Kaleedass Chunder in Bhadro 1261 (September 1854). On the ground of the execution of such conveyances, the defendants other than Kaleedass Chunder, who, if their allegations were true, would all have ceased to have any interest in Pilkhundee, contended that, as to Pilkhundee, the plaintiff's claim was barred by the adverse possession of Ramruttun Mitter for more than twelve years. As to the *lakkhirāj* lands, the respondent Sokheemonee alleged that, though dedicated by the earlier deeds, they were not so by that of 1245, and that, having been resumed and settled by the Government with her in 1250 (1843, the plaintiff's claim thereto was barred both by the ordinary law of limitation,—i. e., by twelve years' adverse possession,—and also under the special law of limitation provided by Act XIII of 1848. The defendant Kaleedass Chunder set up the same defence as to Pilkhundee, and took his stand on the second partition having given Pilkhundee to Gopeenath. The defendant Ramruttun Mitter disclaimed all interest in the subject of the suit, but supported the contentions of the other defendants as to the second partition overriding the first.

Replications and rejoinder having been filed, the issues were framed on the 18th July 1858. The first issue in fact was, as to part of it, substantially the same as in the other suit, *viz.*, whether the partition took place in 1229 (1822) or in 1245 (1838), and whether the widow of Manikram took on his death as *sebdit* in succession to him, or whether under the later deed another *sebdit* was appointed? The second was as to whether Pilkhundee had become the private property of Gopeenath, and had been purchased from him by his wife, and from her by Ramruttun, and from Ramruttun by Kaleedass Chunder? Among the issues in bar was the following:—'No. 4, whether the suit is barred (as regards part of the area sued for) by the law of limitation?'

The documentary evidence put in on either side was almost identical with that in the other suit. The plaintiff examined

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seventeen witnesses to prove that the respondent Sokheemonee continued, as alleged by the plaintiff, and to the contrary of the defendants' allegations, to maintain, as *sebit*, the worship, after her husband's death, for several years, out of the rents of the *lakhirdj* and other endowed property, and that there was no such appropriation to her own secular purposes as is now alleged. The defendant called twelve witnesses; of these, the greater part were called to prove those points which have been already disposed of in the other appeals, viz the *bona fides* and effect of the second partition of 1245 (1838). Some of them spoke also to the alleged sales of Pilkundee by Gopeenath to Puddabuttu, and Puddabuttu to Ramruttun Mitter, and Ramruttun to Kaleedass Chunder. With the exception of the conveyance from Ramruttun to Kaleedass, the deeds of sale were not produced. The deed of sale from Ramruttun recited the second partition as the basis of the vendor's title, and stated it to have been effected by the five brothers, Manickram, Sumboonath, Bishonat, Kaseenath, and Gopeenath. It appeared however in the alleged partition of 1245 (1838) that Sumboonath and Kaseenath were then dead, and their estates were represented by their sons. No witness deposed to having attested that deed, and no evidence was offered to prove the actual payment of the purchase-money or the *bona fides* of the transaction, or of the possession thereunder.

On the 30th of March 1860, the Judge of East Burdwan dismissed the plaintiff's suit with costs. From his judgment it seems that he was of opinion that, in fact, both partitions were colorable and fraudulent, but he was further of opinion that the plaintiff could not "now conscientiously dispute" the latter. And he referred to the partition of 1245 (1838) having been admitted by the plaintiff himself as well as his father. (As to this the appellant's Counsel pointed out there was no evidence.)

The effect of the judgment was, as to *lakhirdj* lands resumed and settled with the respondent Sokheemonee, that the plaintiff was barred both by the ordinary law of limitation and also by the special law of limitation under Act XIII of 1848; but that, as to Pilkundee, he was not so barred, because the defendants had shown no adverse possession in Ramruttun

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before 1853, or in any other defendant, and it appeared that Sokheemonee, even up to the date of the suit, had been asserting her possession as *sebat*; and, on the merits, he held that the second partition was proved against the plaintiff by his own admissions and otherwise; and that, though Kaleedass had failed to produce or prove his vendor's title-deeds, yet the absence of all those documents was compensated by the statements of the defendants that such deeds had been executed, and he accordingly held under the second issue that Pilkhundee had been the private property of Gopeenath, and was purchased from him by his wife Puddabutty with her own funds, and was sold by her to Ramruttun Mitter, by whom it was again sold to Kaleedass Chunder. He however expressed his opinion "that there are many suspicious circumstances connected with the dealings of the late Gopeenath, which have not been cleared up in the course of the very lengthy enquiry made into the case."

On the 20th of June 1860, the plaintiff Hurreenath having died pending the suit, his son and heir Mohendronath Dutt and the appellant Juggutmoheenee Dosee, the widow of another son of Hurreenath, and guardian of his minor sons, appealed to the High Court from the Judge's decree, and the Judges of the Division Bench (Kemp and Campbell, JJ.) having differed in opinion, the appeal was dismissed on the 15th of April 1863.

Kemp, J., was of opinion that the first partition of 1229 (1822) and the preceding endowments were *bonâ fide*, and the endowments real, and that the alleged partition of 1245 (1838) was not *bonâ fide*, and that its execution was not proved, and that there was no evidence of any admission of it by Hurreenath's father, or by Hurreenath himself; and that, therefore, the estate of Pilkhundee being endowed, the alienations of it were invalid, and must be set aside. He also held that, as to the law of limitation affecting the claim to Pilkhundee, there was no proof of any sale to Puddabutty from Gopeenath, or of her having *stridhan* wherefrom to pay the purchase-money, or of any sale to, or real possession by, Ramruttun Mitter, and that the alleged purchases were invalid, *benâmi*, and fraudulent, and there had been no *bonâ fide* adverse possession. As to the *lâkhiraj* lands resumed and settled with Sokheemonee, he considered that such settlement

having been made with her not as *sebat*, but in her own right, and more than three years before the institution of this suit, the plaintiff's claim was barred under the provisions of Act XIII of 1848 (1838). He held that the plaintiff was not entitled to be appointed *sebat*, and that the relief to which he was alone entitled was to have a declaration made that the alienation of Pilkhundee, which was an endowed estate, was invalid and void.

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Campbell, J., was of opinion that, though the parties alleging the partition of 1245 (1838) had not fully proved it, and "much doubt might be cast on the character of that deed," yet the *onus* was on the plaintiff, and that he had not disproved that deed which had been in existence for several years, and the possession under it, which it was "probable that at one time Bishenath had consented to, although Hurreenath never did," he therefore was of opinion that the appeal should be dismissed.

The plaintiffs then appealed to England.

Sir R. Palmer, Q.C., and Mr. Doyne, for the appellants, in going fully into the facts, contended that the judgment of the first Court appeared to be founded upon the plaintiff being estopped from disputing the second partition, which was equally erroneous with the doctrine of Campbell, J., that the *onus* of disproving the second partition lay on the plaintiff. So far as the respondents who had been parties to the other appeal were concerned, it was by that appeal decided that the partition took place in 1229 (1822), and not in 1245 (1838); and as regarded Kaleedass Chunder, the *bonâ fides* and effect of the former partition, and the fraud and absence of proof of the validity of the latter, were fully established. The partition of 1229 (1822) and the continuing endowment of Pilkhundee being established, the sale of it as private property to Kaleedass, even if proved, could not be upheld, and in that respect Kemp, J., was right. As to the resumed and *lâkhirâj* lands, Act XIII of 1848 could not apply, that relating merely to the right of possession, and not to cases of trust and title. As to such lands as had been held by the Judicial Committee to be impressed with the religious trust,

1871 they submitted that the appellants were entitled to possession as *sebaits*.

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Mr. *Leith* for Kaleedass Chunder (the other respondents not appearing, contended that, under the circumstances, it clearly lay upon the plaintiff in this ejectment suit to recover on the strength of his own title, and Campbell, J., was right in putting the *onus* on him. He went fully into the evidence, relying on his client being a *bonâ fide* purchaser without notice, and arguing that the evidence established that the plaintiff and his father through whom he claimed had so far acquiesced in the deed of 1845, and allowed the several members of the family and also third parties to deal with separate portions of the property for valuable consideration on the footing of the validity of the deed, that he was estopped from impeaching the title of Kaleedass. He also argued that, even if it were proved that there had been a dedication to religious purposes, there had been no such assent on the part of the state as to render it incompetent to the family to revoke them, and he commented on the fact of the instruments of dedication not having been registered about the time of their execution. He also relied on the law of limitation as having been properly held to be a bar to the suit.

Sir *R. Palmer*, Q. C., replied.

Their LORDSHIPS delivered the following judgment :—

This is an appeal from a decree passed by Kemp and Campbell, JJ., forming a Division Bench of the High Court of Calcutta, affirming a decree of the Judge of East Burdwan, by which the suit of the plaintiff, now represented by the appellant, was dismissed.

The Judges of the High Court differed in opinion on the effect of the evidence ; Kemp, J., expressed his to be in favor of the plaintiff as to part of the relief which he prayed against Kaleedass, the only respondent who appears on this appeal ; but as the Judges were not unanimous, the decision given in the Court of first instance stands unreversed (1).

(1) By Act XXIII of 1861. s. 23.

The plaintiff's suit was for possession, but not for possession in the ordinary character of proprietor of lands; he made title to the possession of these lands, for which he sued, on this special ground that they had been dedicated to the religious service of the family idol, by virtue of two instruments of dedication in the Christian years 1818 and 1820, which still, at the time of the suit, impressed on the lands a trust, which by his suit he sought to have declared. This was the foundation and main character of his claim, though, somewhat inconsistently with the nature of the dedication, he sued for a certain proportion only, as though the suit had been one in respect of private interest. The Court could not have so dealt with the possession under these instruments of dedication. He asked also to be appointed *sebat*. His plaint embraced other charges of breach of trust, relating to other properties, which are no longer insisted on. The properties which this appeal relates to are one called lot Pilkhundee, to which the respondent makes title as a purchaser *bonâ fide* for value without notice, and certain other lands enumerated in a schedule to the plaint, which were once claimed to be held as a *phirâj*, were resumed by the Government as held under an invalid *lakhiraj* title, and were permanently settled for with Government by Sokheemonee Dosee. The appeal against her was heard *ex parte*. All these properties were comprised in, and dedicated by, the two instruments of dedication before-mentioned. The first *sebat* was the husband of Sokheemonee, and after his death she held a portion at least of the dedicated lands by the title of *sebat* in succession to her husband. Notice of the trust, if it be valid, is clearly established against her. Her claim as to the lands resumed is advanced under her settlement with the Government, the nature and effect of which will be subsequently considered. The title of Kaleedas to lot Pilkhundee is derived through successive alleged alienations under a deed which will be described as a second deed of partition, by which, as he contends, a valid partition of the family property was first constituted. He admits that a deed, purporting to be one of partition between the five brothers who constituted the joint family, had been executed some years before, and that the dedication insisted on by the plaintiff had been in fact made under

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those instruments of dedication before-mentioned, but he seeks to avoid the effect of all upon the same grounds which were unsuccessfully advanced in the case lately decided by their Lordships on appeal, when the earlier deed was established as the valid deed of partition of the family property. This decision, which is partly stated in the appellant's case, and which was read in full on the argument, need not be further referred to, except to state that the facts there decided cannot be considered to have been established against Kaleedas, who was not a party to that suit. Their Lordships, therefore, will proceed to consider the facts of the case solely upon the evidence which this case presents.

The nature of the suit must be borne in mind, in considering certain questions which arise in the cause as to the burthen of proof, the general law of limitation, the special law of limitation under Act XIII of 1848, the claim to possession, and the limitation of that claim a portion or share of the whole property dedicated.

The suit, although it seeks to set aside the mutation of names and to have possession decreed to the plaintiff, seeks that relief as incident to the establishment of the trust. Although that relief cannot, in the present state of litigation, as the proceedings have been instituted and conducted, be allowed, still it must be considered that the suit is brought to establish a religious trust. The trust is created by the instrument of 1813, confirmed by that of 1820. It is not constituted by the first partition deed. If any vice existed to defeat this partition deed that vice would not affect the dedication of the property under the antecedent instruments to the religious trust, if they show a real, and not merely a colorable, dedication.

The two deeds which create and confirm the dedication are *prima facie* valid. Nothing is proved to lead to the belief that they are at variance with the usages of the country, or family or that, regard being had to the value of the property dedicated, and to the property at that time of the family, there is any excess in the appropriation to the religious services of the family of the portion of the family property thus set apart, such as to generate distrust of its reality. It was argued that such

dedications of property, without the assent of the state, should be regarded as merely revocable appropriations of which the founders might vary the use. No authority whatever was adduced in support of this position which strikes at the root of most modern endowments of the like nature. A family trust of this nature has never, in modern times at least, been held to require such an assent. The cases supporting such trusts are too numerous for citation. They are collected in Norton's Leading Cases on Hindoo Law, Part ii, p. 406. The argument of Mr. Leith, founded on the non-registration of these instruments of dedication at the time, or shortly after the time, of their execution, and on the subsequent registration of them at the time, of the registration of the first deed of partition,—viz., that they constituted in effect one instrument, and rested on the sole foundation of the first deed of partition,—was not urged in the Courts below, and appears to have no foundation of fact to support it, since the mere contemporaneous registration of the three furnishes no ground for presuming such union. There is abundant evidence that all were acted on. The trust declared on appears then to be established as to the lands dedicated by these two prior instruments; and it lies on the respondents to show some subsequent legal conversion of the lands to the ordinary uses of property.

The second deed is said to work this conversion, and the question arises which of the two deeds of partition is to prevail. The first deed of partition is an instrument which, but for the existence of the second, would have been exposed to no suspicion. A partition is favorably viewed by the Hindoo religion and law. It wants no extrinsic support. The alleged presumption against the first deed, that it may have been a mere device because one member of the family was indebted, may more reasonably be removed than maintained by due attention to that fact. Such a state of things often leads to partitions, but to fair and honest ones. It would be a prudent course in the members of a joint family to prevent, by a partition, the interference of strangers in their family arrangements, and an enquiry into the state, condition, extent, and uses of their joint property; and no suggestion

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has been made that the partition under the first deed was unequal. The second deed, however, does afford ground for suspicion. It makes no reference whatever to the first deed; it professes to be the ordinary partition of a, till then, joint family property; it appoints as a *sebai* one whom no prudent person would appoint a trustee—one an actual insolvent. Such an appointment, independently of its obvious impropriety, would be little likely to be made by a Hindoo family having several and more competent members, from the fear of the scrutiny to which it might lead if the creditors of the *sebai* traced the property to his possession. Again, as a dedication in fact was to be defeated by it, some difficulty on this ground alone would present itself to the minds of those who might meditate on the change which this deed seeks to effect. All comparison, therefore, supports the deed prior in time, which priority alone, in a balanced state, would establish the first instrument. It was urged with great force in the argument that every Judge and Court that has hitherto dealt with this second deed has either actually declared it invalid, or stated it to be subject to grave suspicion. A decision against the plaintiff generally in this suit would be, in substance, deciding against a trust *prima facie* well established, on evidence of a subsequent deed of revocation not only not proved, but on every judicial examination of it discredited. Their Lordships, therefore, think that a trust was created by the deeds of dedication of the Pikhundee property.

It remains to be considered whether the respondent can support the decree in his favor upon the ground that he is a purchaser for value without notice. Now the very origin of his title, as well as the contention on the mutation of names, proves that he must have had notice of the original trust. The detraction of the title to him from Gooroochurn under the second deed is, until the conveyance to himself, accompanied with very suspicious circumstances at every stage of it, such as ordinarily accompany an attempt in a Hindoo family to put property out of the reach of an apprehended claim. He is not shown to have made any enquiries as to the grounds for supposing that the trust was legally at an end; and, therefore, he cannot exonerate the property from the trust which attached to it.

The principal claim of Sokheemonee to hold the resumed lands free from this trust on the grounds advanced by her, is destitute entirely of legal foundation. She did not rest her title so much on the operation of the second deed of partition as a revocation of the first, as on the effect of the resumption proceedings and the settlement for revenue with her. Such a settlement does not establish proprietary right in the land, but is made with Government as to their claim to their *khirdj* or revenue. The settlement and the possession under it, being evidence of a right to possession, are also so far evidence of proprietary right, but do not necessarily constitute it. *A fortiori*, they could not divest and destroy trusts to which the settlor was subject. The claim supposes a mere settlement for revenue to have the same effect in clearing away preceding titles which a sale under the revenue law works; but antecedent trusts have, in certain cases, been impressed by the decisions of Courts of Justice, including this tribunal, on estates acquired even under these revenue sales; (see the cases referred to in Mr. Justice Macpherson's work on Mortgages, p. 86, 5th edition.) Sokheemonee could not get rid of her *sebat* title and possession by the machinery of this settlement, though it was in terms made with her as a private person. Therefore the claim of the plaintiff, so far as he seeks to have the trust established as to the property, receives no answer whatever from the laws as to limitation of suits, or from the terms of the settlement for revenue with her.

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It remains to consider one argument which was addressed to their Lordships on one part of the evidence, which seems not to have been formerly distinctly advanced.

It was urged that the evidence shows that the family had, in several instances, under the first deed, dealt with other portions of the property included in the dedication instruments as though they were private property. This argument was thus met, that there was no proof that the properties so dealt with were dedicated properties, since the identity of the name was perfectly consistent with properties held separately under *māl-guzāri* and under *lākhirāj* titles, which might both bear the same description; that a disposition of part might not be to the prejudice of the trust necessarily; and that changes of property,

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not designed otherwise than for the benefit of the endowment, would not be questioned in a Court of Justice. The correctness of each position cannot be gainsaid, and the argument for the respondent on this point, which is conjectural, is conjecturally answered. How the real facts may be, it is not possible for their Lordships on the evidence to decide; but this is to be observed, that a former abuse of trust, in another instance, cannot be pleaded against a trustee who seeks to prevent a repetition of abuse, even if he were formerly implicated in the same indefensible courses against which he is seeking to protect the property, though it would be a reason for excluding him from the administration of the property as *sebat*. The Court could not, with any propriety, say we will decline to protect the property, and leave it further exposed to loss, and decline to make a declaration that it is trust property, merely because they would not trust the plaintiff with its administration.

The title being one founded on trust, and the contention of the holders being that it is not now in their hands subject to the trusts, *prima facie* at least, attaching to it, the *onus* of the proof was on them. They did not discharge themselves by proving a deed, as to which Campbell, J., declares that he probably would not have made it the foundation of a decree in their favor. The learned Judge appears further to have mistaken the nature of the change of possession, which he considered to have prejudiced the plaintiff's case. The old *sebat* title was recorded in the Collector's registry. A mutation of names—in itself a change—was applied for on the part of Kaleedass, and resisted on the part of the plaintiff, claiming as trustee. The plaintiff was, in effect, referred to a civil suit; and the very reason of such a reference, *viz.*, that the matter is not in the jurisdiction of the revenue officer, cannot, either in reason or law, invert the ordinary course of proof and presumption in a civil suit to establish a trust. Their Lordships think the judgment of Kemp, J., on the facts of the case, correct, and the decree which, but for the supposed law of limitation, Kemp, J., would have given as to the resumed lands, as well as to Pīlkhundee, is that which their Lordships will humbly advise Her Majesty to make.

Their Lordships will, therefore, humbly advise Her Majesty that the appeal be allowed; that the decrees of the High Court and of the Court below be reversed, so far only as they dismiss the claim of the plaintiff to set aside the alienation of lot Pilkhundee, and to have the trusts of the dedication instruments declared; and that it be declared that the lands specified in the schedule to the plaint, and the said Pilkhundee, were and continue dedicated under the instruments of dedication of 1813 and 1820 to the religious uses specified in those instruments of endowment; and now add a declaration that this decree is to be without prejudice to any further suit or proceedings for the enforcement of the religious trusts declared on the appointment of a proper *sebat*.

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Their Lordships think that the costs in the Courts below should be allowed to the respective parties, according to the usual course of proceeding in those Courts when a plaintiff recovers part of his demand, and that the appellant should have the costs of this appeal.

Appeal allowed.

Agents for appellants: Messrs. *Bailey, Shaw, Smith, and Bailey.*

Agents for respondents: Mr. *Wilson.*

BABOO LAKRAJ ROY (DEFENDANT) v. BABOO MAHTABCHUND
(PLAINTIFF),

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Dec. 21.

[On appeal from the High Court of Judicature at Fort William in Bengal

*Guardian—Infant—Compromise—Burthen of Proof—Fraud—Reversal
of Concurrent Findings on Fact.*

It is not incumbent upon a guardian to contest every claim made against the infant's estate.

The Judicial Committee, reversing the finding of the Courts below, refused to set aside a compromise (confirmed by a decree of Court) by the former guardian of the plaintiff of a claim against his estate for debt after sixteen years, the plaintiff having failed to prove that the suit was fictitious, and the compromise fraudulent and collusive.

* *Present* —THE RIGHT HON'BLE SIR JAMES WILLIAM COLVILLE, SIR MONTAGUE SMITH, SIR ROBERT P. COLLIER, and SIR LAWRENCE PEELE.

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THIS was an appeal from a decision of the High Court, dated 5th January 1865, affirming a decision of the Principal Sudder Ameen of Purneah, dated 18th February 1863.

The respondent, Mahtabchund, was plaintiff, and he sued to set aside a compromise made by his guardians in an action brought against him, as being fraudulent.

Sulamut Roy, a Banker, employed one Laljee Mull, adoptive father of the respondent Mahtabchund, to manage his business. Laljee Mull, by his will, appointed Inderjeet Mull, Mahtabchund's natural father, and one Gungapersad, guardians of his adopted son, and they administered to Laljee Mull's estate. Gungapersad also acted as *gomastha* for Surbeswaree, the widow of Sulamut Roy.

In 1846, Surbeswaree, on behalf of her infant son Lekraj Roy, the present appellant, sued Inderjeet Mull and Gungapersad, as being possessed of Laljee Mull's estate and as guardians of his infant adopted son, to recover sums alleged to have been misappropriated by Laljee Mull. They put in an answer denying the claim, but soon afterwards effected a compromise with the widow, stating in the deed:—"At present, agreeably to the advice of the gentlemen of the city, considering that peace is better than contest, we settled the whole claim of the plaintiff for the sum of Rs 74,000, the rest of the claim and cost, &c., being remitted by the female plaintiff." The document then provided for immediate payment of Rs. 13,360, and of the balance by instalments. Under this alleged compromise, Rs. 68,953-15-6 (being the amount for which, with interest, Mahtabchund sued in this case) was paid. On the 11th of January 1847, the Judge of Purneah passed a decree in the suit in accordance with the compromise filed and acknowledged before him by the pleaders on either side. Mahtabchund attained full age in December 1861; and on the 31st of that month, he filed a petition in the Court of the Judge of Purneah, asking for a review of the judgment of the 11th January 1847, on the ground that that decree had been passed in consequence of collusion between his guardians and the plaintiff Surbeswaree. The Judge of Purneah, on the 14th May 1862, refused to go into the question of collusion.

Mahtabchund, therefore, on the 3rd of January 1863, instituted the present suit against Lekraj Roy, who was still an infant. Gungapersad, and Mussamut Mancoonwar, the 'widow of Inderjeet Mull, to set aside the alleged compromise on the ground of collusion, and to recover back the amount paid, with interest. Lekraj Roy, on the 18th of February 1863, filed a written statement, alleging the *bona fides* of the compromise and of the debt in respect of which it was entered into, but giving no particulars whatever of the latter. Gungapersad, on the 19th of February 1863, filed a written statement, by which he sought to throw the whole responsibility of the compromise on Inderjeet Mull. On the 21st of February 1863, issues were framed, and on the 6th of April 1863, the Principal Sudder Ameen, on the application of Mahtabchund, directed that Lekraj Roy should be summoned to give evidence, and to produce the account-books referred to in the plaintiff's petition. Lekraj Roy objected to produce these books unless the plaintiff would specify the years to which they referred. The Principal Sudder Ameen considered that the plaintiff could not do so, and that the description was sufficient, and ordered that the books of account should be filed. No account-books had been filed in the former suit. On the 8th of May 1863, the Principal Sudder Ameen directed a second summons to be served on Lekraj Roy's pleaders requiring his appearance; and there upon books commencing with an item dated subsequently to the institution of the former suit were filed on behalf of Lekraj Roy, who also petitioned to be excused from personal appearance, and sought to lay the burthen of proof on the plaintiff. The Principal Sudder Ameen rejected this petition, and Lekraj Roy still not appearing to give evidence, the Principal Sudder Ameen, on the 17th of August, interrogated his mooktear as to where his principal was, and as to where the account-books were on which the first suit was brought against the guardians, and why they were not filed. The mooktear replied that he had no knowledge where his client was, but knew that he had been informed of the institution of the suit; and that as to the books of account, he did not know where they were, and had been prevented from looking for them during the previous six months by reason of his pleader

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being sick. On the following day, the 18th August, being the day on which judgment was delivered, ten extracts from alleged account-books were filed on behalf of Lekraj Roy, purporting to be for a period from the Sumbut year 1898 to 1902, or from about 1841 to 1845. The Principal Sudder Ameen stated in his judgment that these books were not marked as having been filed in Court in the former suit; and on their production it appeared that he had a formal proceeding recorded of the question put by him to the pleaders of Lekraj Roy as to whether those books had been filed in the former suit, and of the answer that nothing was known on the subject by any one. These extracts did not show that Laljee Mull was debited with more than Rs. 18,519-4-6, and the Principal Sudder Ameen stated his opinion that they were unreliable and useless as proof. A number of witnesses were examined on either side. Mahtabchund himself obeyed the summons of the Court and gave evidence, but Lekraj Roy did not appear. The witnesses, called on behalf of Lekraj Roy, alleged that the moneys in respect of which the first suit had been brought were really due, and they stated that that indebtedness was then established by the production of account-books, and that arbitration was resorted to. None of the arbitrators were called as witnesses. On the 18th of August 1860, the Principal Sudder Ameen delivered judgment, and passed a decree in favor of the plaintiff's claim. The points for decision were thus stated in his judgment:—

"1. Whether or not in the suit by Mussamut Surbeswaree, mother of Lekraj Roy, defendant, laid at Co.'s Rs. 1,76,059, on account of the appropriations by Laljee Mull, deceased, adoptive father of the plaintiff, against Inderjeet Mull, deceased, guardian and real father of the plaintiff, and defendant Gungapersad, another guardian of the plaintiff, both the guardians put in a collusive *kaulnamah*, and thereby caused a decree to be passed (against the plaintiff) for Rs. 74,000 ?

2. Was that sum actually appropriated by Baboo Laljee Mull, deceased, or the two guardians had collusively admitted an unjust debt, and is the amount paid on the strength of the said decree refundable with interest or not; and if the *kaulnamah* be proved to be collusive, which of the defendants ought to be held liable for the payment of the damages on account of it ?

3. Whether or not the defendant Mussamut Mancoonwar, widow of the late Inderjeet Mull, is in possession of the property left by her deceased husband?"

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He held that the evidence established the collusion with Surbeswaree of the guardians, Gungapersad having entered into her service, while at the same time he had entire control of the plaintiff's estate and affairs, the other, Inderjeet, being "very dull and without common sense;" and he also held that it lay on the defendant Lekraj to show that the debt, in respect of which the compromise had been alleged to have been entered into, was actually due, and that he had failed wholly to do so; that he had, though repeatedly cited, failed to appear; and that the books filed by him proved nothing; and that it appeared that, though the compromise purported to have proceeded on accounts then examined, in fact "on reference to the record of the former case, it appeared that a home-spun account not bearing anybody's signature, and two *dukhilas* (receipts) were put in as evidence in that case on the part of Surbeswaree."

His decree was as follows:—

"This case be decreed. Let the collusive decision obtained by means of the *Kaulnamah* dated the 7th of January 1847 A. D. be set aside. Let plaintiff recover from Lekraj Roy and Gungapersad, the defendants, jointly, and from the estate of Inderjeet Mull, deceased, the principal sum of Co.'s Rs. 68,726-18-6-15 krants. and interest of the same amount for the period previous to the suit, only from Gungapersad, defendant, and also from the estate of the late Inderjeet Mull. Let plaintiff also recover interest of principal from the time the suit was pending, with interest of all those moneys, from this date to that of realization, at 1 per cent *per mensem*, from both the defendants aforesaid, and from the estate of the deceased above-mentioned; plaintiff to get in like manner costs proportionately to their respective joint liabilities, from the defendants and from the estate of the deceased."

From this decision Lekraj Roy appealed to the High Court on various grounds, *inter alia*, that the production of accounts in either the former or present suit was unnecessary; and that as he had "journeyed into distant countries," he could not attend to give evidence.

On the 5th January 1868, a Division Bench of the High

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Court (Morgan and Pundit, JJ.) affirmed the judgment of the Principal Sudder Ameen, and adhered to their opinion on an application for review. Their judgment was as follows:—

"The compromise having been made many years ago, and having been ever since acted on, it is not now to be set aside, unless the plaintiff shows clear and satisfactory grounds for the Court's interference. He instituted the present suit soon after he reached his full age, and he has obtained a decree in the Principal Sudder Ameen's Court, that Court being satisfied that the compromise was collusive.

The plaintiff has, we think, shown that the estate of Laljee Mull, by whom he was adopted, was in effect unprotected in the suit and proceedings antecedent to the compromise.

The plaintiff's natural father, a person of weak understanding, took only a formal share in the management of estate, while the conduct of Gungapersad, the other manager, appears throughout the transaction highly suspicious. He is found after the compromise in the service and confidence of the widow Surbeswaree in whose favor he had admitted the liability of the minor's estate to this large sum.

The evidence of any such liability by reason of the defalcations of Laljee Mull is of the most meagre and unsatisfactory description. The character and position of the several parties to the compromise justify the Court in receiving it with suspicion, and in requiring further proof of its fairness. Such proof the defendant might and ought to have given by production of the account-books. He has failed with some slight exception to produce the books, or to account to our satisfaction for the non-production.

We agree with the Principal Sudder Ameen in holding that the plaintiff's evidence, unanswered as it has been by the defendant, fully justifies the Court in setting aside the compromise as fraudulent and collusive.

The decree of the Court below is affirmed, and this appeal dismissed with costs."

Lekraj Roy thereupon appealed to Her Majesty in Council.

Mr. Field, Q. C., Mr. Leith, and Mr. Mozoomdar for the appellant.—Although there are two concurrent judgments on fact, there has been a mistake of law in throwing the burden of proof on the infant appellant. This suit was a hostile suit, and it is proved that there was a regular reference to arbitra-

tion. It is proved that the suit was contested. This is an attempt after sixteen years to follow the assets into the hands of one of them an infant. There is no proof of fraud, and the whole circumstances, the father of the present respondent being one of the parties to the compromise, show the improbability of this.

Sir R. Palmer, Q. C. and Mr. Doyne for the respondents.—It lies on a guardian to prove the *bona fides* of a compromise on behalf of an infant, and he who benefits by that compromise is equally bound to prove this—*Hunoomanpersaud Panday v. Musamat Babooes Munraj Koonweree* (1) and *Lalla Bunseedhur v. Koonwar Bendeserees Dutt Singh* (2). In Chancery a decree by consent is not binding on an infant, unless proved to be perfectly honest. The non-production of books is an important element in looking at the proof of *bona fides*, and the destruction of books before a final settlement is strong presumption of fraud—*Gray v. Haig* (3). The natural father was a man of weak mind, and the other guardian was the *gomashtha* of the appellant's mother.

Mr. Field in reply.—There has been no destruction of books. Some are no doubt missing, but the loss is accounted for.

Their LORDSHIPS gave the following judgment :—

The principal facts of this case are as follows :—

Sulamut Roy, a merchant and banker, employed Laljee Mull as the principal manager of his business. On the death of Sulamut Roy, Laljee Mull continued to manage the business, which was carried on in the name of Surbeswaree, the widow, and Lekraj Roy, the infant son, of Sulamut Roy. Laljee Mull adopted Mahtabchand, the infant son of his brother, Inderjeet Mull, and appointed, by will, Inderjeet Mull and Gungapersad, a *gomashtha* in his service, the guardians of his adopted son. Laljee Mull died in August 1845, and on the 26th September 1845, a certificate under Act XX of 1841 was duly granted to the guardians, notwithstanding the opposition of Surbeswaree.

(1) 6 Moo. I. A., 393.

(2) 10 Moo. I. A., 454.

(3) 20 Beav., 219

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In January 1846, Surbeswaree, as the mother and guardian of Lekraj Roy, instituted a suit against Inderjeet Mull and Gungapersad to recover from the estate of Laljee Mull the sum of Rs. 176,152-7-4, being the amount of alleged defalcations or misappropriations on the part of Laljee Mull. After various proceedings had taken place in this suit, and witnesses had been examined on both sides, it was settled by a "*rafnama*," or deed of compromise, whereby it was agreed that Rs. 74,000 should be paid by the defendants in instalments. This "*rafnama*" was filed on the records of the Court on the 11th of January 1847, and confirmed by a decree.

Mahtabchund came of age in October 1861, and, on the 3rd January 1863, commenced the present suit against Lekraj Roy, the son of Surbeswaree (who had died in 1850), to recover from him all that had been paid, together with interest thereon, under the above deed of compromise, amounting to Rs. 68,758-15-6, on the ground that the suit of 1846 was a fictitious one, and that the compromise of it was fraudulent and collusive between Surbeswaree and the guardians of Mahtabchund.

Judgment was given, in the plaintiff's favor, to the full amount of this demand, in the Zillah Court; and that judgment was subsequently affirmed in the High Court. Against this judgment the defendant appeals.

There is no allegation of fraud against the defendant, who at the time of the transaction which is impeached, was a child of ten years' old. The plaintiff took upon himself the burden of establishing fraud and collusion on the part of the defendant's mother and his own guardians, one of whom was his natural father. It was contended that, inasmuch as the guardians were dealing with the property of an infant, it was incumbent on the defendant to show that such dealing was for the infant's benefit; and the case of *Hunoomanpersaud Panday v. Musamat Babooee Munraj Koonweree* (1), followed by *Lalla Binseedhur v. Koonwar Bendeseree Dutt Sing* (2), was referred to in support of this proposition. But it is to be observed that, in the latter case, fraud on the part of the guardian was clearly

(1) 6 Moo. I A., 393.

(2) 10 Moo. I. A., 454.

established, and that in the former, the question turned on the power of guardians to charge an infant's estate by way of loan or mortgage, whereas no such power is here in question, inasmuch as it was the manifest duty of the guardians, who were also administrators of the estate (having received a certificate in pursuance of Act XX of 1841), to pay all just debts of the testator.

Their Lordships have carefully examined the evidence on the part of the plaintiff, and are unable to find in it anything amounting to proof that either the institution of the suit or the compromise was fraudulent or collusive. Although the greater part of the proceedings in that suit have been destroyed, it is sufficiently plain from what remains that it was to all appearance a contested suit, and that it had proceeded to the point of depositions being taken on both sides before it was compromised under a decree of the Court. The evidence by which the plaintiff seeks to set aside that decree which had been in force for sixteen years is, that Gungapersad filled the double character of guardian of the plaintiff and *gomashia* to Surbeswaree; that Inderjeet Mull was a man of weak understanding under the influence of Gungapersad; and that it was publicly known at the time that the settlement was unjust. The latter description of evidence was inadmissible, while the former could at the most raise a certain amount of suspicion, not approaching to proof, or even presumption, of the *mala fides* of Gungapersad; while, on the other hand, there is a strong presumption against Inderjeet Mull entering into a conspiracy for the purpose of defrauding his own son.

Their Lordships have further examined the evidence of the defendant, with a view to ascertain whether it supplies the defect of proof on behalf of the plaintiff. It undoubtedly appeared that the defendant absented himself, in order to escape examination; that he withheld the account-books in his possession until peremptorily required to produce them, and abstained, without explaining why, from calling some persons still alive who are described as forming an assembly of arbitrators, to whom the accounts of Laljee Mull were submitted before the compromise in the former suit. It is further stated by the Judge of the

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Zillah Court that the accounts when produced disclosed upon the face of them only a balance of about Rs. 18,000 as due from Laljee Mull, upon which two observations arise—first, that whatever the defalcations of Laljee Mull may have been, they would not necessarily have appeared on the mere inspection of the books; and, secondly, that, if a defalcation to the above amount appeared on Laljee Mull's own showing, the defendant would be entitled to retain at the least that amount. We do not dwell on the deposition of the witness called by Gungapersad, apparently with the view of contradicting the plaintiff's case, which was that Inderjeet Mull was a tool in his (Gunga's) hands, and of exonerating himself by throwing the whole responsibility of the transaction upon Inderjeet. Although the plaintiff, if he had proved a case of fraud, might have been justly entitled to contend that it was not answered by that of the defendant, still their Lordships cannot regard the case of the defendant as supplying that proof of fraud which the plaintiff failed to adduce, and without which the compromise of 1847 could not be set aside. It is undoubtedly the duty of guardians scrupulously to regard the interests of minors in dealing with their estates, and the Court will, when necessary, enforce the performance of this duty. But the interests of infants would seriously suffer if a notion were to prevail that guardians were bound for their own security to contest all claims against an infant's estate, whether well or ill-founded; and such a notion might prevail if the compromise of a claim of debt, confirmed by a decree of a Court, were to be set aside after sixteen years without distinct proof of fraud.

Their Lordships fully subscribe to the rule which has been more than once laid down, that a very strong case on the part of the appellant is required to induce them to set aside the finding of two Courts on a question of fact. In this case, however, they are of opinion that the Judge of the Zillah Court fell into an error in point of law, in assuming that the burden of proof of the debt lay upon the defendant. The burden of proving his allegations that the suit was fictitious, and the compromise fraudulent and collusive, lay upon the plaintiff: and an element in that proof, without which his case amounted to

nothing, was the non-existence of a debt. It rested, therefore, with him to give, at all events, some *prima facie* evidence of this before the burden of proof was shifted to the defendant. Inasmuch as this error seems to have influenced the decision of both the Indian Courts, who, in the opinion of their Lordships have given undue weight to the non-appearance of the defendant (a mere child at the time of the transaction in question), and to his reluctance to produce the books, their Lordships consider that they are not infringing the rule above referred to by deciding in favor of the appellants. On these grounds their Lordships will humbly report to her Majesty that the decrees of the High Court and of the Zillah Court ought to be reversed, and that in lieu thereof a decree ought to be made dismissing the respondent's suit with costs, and their Lordships will direct that the appellants have the costs of this appeal.

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Decree reversed.

Agent for appellant : Mr. Wilson.

Agent for respondents : Mr. Barrow (1).

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(PLAINTIFF) v. SHEIKH HAMID HOSSEIN AND ANOTHER (DEFEND-
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AND

MUSSAMUT BEBEE BACHUN AND OTHERS (DEFENDANTS) v. SHEIKH
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P. C.*
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[On appeal from the High Court of Judicature at Fort William in Bengal.]

Mahomedan Law—Dower—Lien—Reversal of Concurrent Findings on Fact.

Where the widow of a Mahomedan obtained actual and lawful possession of the estates of her husband under a claim to hold them as one of the heirs and for her dower, it was held that she was entitled to retain possession until her dower was

(1) The respondent Mahtabchund had sold his interest in the suit to the other respondents, but having repurchased a portion, he sought through his agents, Messrs. Watkins and Lattey, to be allowed to lodge a case; as the other respondents however in fact represented the whole matter in dispute, and had already lodged a case, the Registrar refused to receive one on behalf of Mahtabchund, and their Lordships, on being applied to, declined on the 19th June 1871 to interfere.

Present :—THE RIGHT HON'BLE SIR JAMES W. COLVILLE, SIR MONTAGUE SMITH, SIR ROBERT P. COLLIER, and SIR LAWRENCE PEARL.

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satisfied, with the liability to account to those entitled to the property subject to the claim for the profits received.

The Courts below, without ascertaining the amount of the widow's dower, decreed possession of the estates to the heirs. Such decree was reversed on appeal, and the amount of dower was ascertained,

THESE were consolidated appeals from the judgment of the High Court (Steer and L. S. Jackson, JJ.), dated 24th December 1863, in two suits, in the former thereof the appellant Mussamut Bebee Bachun was plaintiff, in the latter she and others were defendants.

Sheikh Villayut Alee, residing in Behar, died in March 1851, leaving the appellant, his widow, and Mussamut Raheebun, his sister, his sole heirs; the widow being entitled to one-fourth, and Mussamut Raheebun to three-fourths, of his estate. Mussamut Raheebun died shortly after her brother, leaving her son and daughter, the present respondents, her heirs.

The widow having obtained possession of her husband's estates, the proceedings, which are detailed in their Lordships' judgment, and which led to the present appeals, took place.

Mussamut Bebee Sagra and Moulvie Abdool Aziz claimed as purchasers of portions of the property from Mussamut Bebee Bachun.

The suits in the Courts below were distinguished as Nos. 177, the dower suit, and 178, the suit against the widow for possession of the property.

The Principal Sudder Ameen decreed that the nephew and niece of Villayut Alee were entitled to possession of three-fourths of his estate; he disregarded Bebee Bachun's claim upon it for her unpaid dower, holding that she had not proved her right to dower. The High Court (Steer and L. S. Jackson, JJ.) on appeal affirmed the judgment of the Principal Sudder Ameen, giving in the dower suit the following judgment:—

"The other suit is No. 177, and was brought by Bachun to recover from the plaintiffs in the other case, No. 178, the amount of her dower, which she avers was fixed at the time of her marriage with Villayut Alee, forty years ago, at Rs. 40,000 and one gold mohur payable after the demise of her husband.

It is of course denied that the amount of dower was the large sum which Bachun represents: it is affirmed, on the contrary, that the

dower was Rs. 500 (1); and it is contended that, whatever the amount the dower might have been, even allowing it to be Rs. 40,000, the mesne profits of the entire property left by Villayut Alee, which have been appropriated by Bachun, the plaintiff, have more than liquidated the amount of her dower.

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The Principal Sudder Ameen, holding it not to have been proved by trustworthy witnesses that the dower was Rs. 40,000 and one gold mohur, has dismissed the suit.

We have read the entire evidence in support of the plaintiff's case, and we must say that it would be quite impossible, upon the bare testimony of such persons as the plaintiff has produced, to declare that she is entitled to demand out of her late husband's estate the immense sum of dowry which she claims. In a Mahomedan marriage between contracting parties of rank and affluence, there must of course have been some dowry, and it was probably a handsome one; but where there are no written deeds, it is requisite that the amount of dower should be proved on the testimony of men whose word we could safely trust. Such are not the witnesses on the part of the plaintiff; they are of a low order in life, and most of them acknowledge that they derived their information, in regard to the amount of dower, from having gone to see the marriage procession.

The omission of the defendants to sue for their share of the inheritance indicates a consciousness on their part that Bachun had a claim for dower to be satisfied from the estate: and as the amount of dower was doubtless considerable, though we cannot declare what the exact amount was, we think that, under the circumstances of the case, it will be just and equitable to order that the defendants receive no mesne profits, except what has accrued since the institution of their suit.

With this modification we confirm the judgment of the lower Court in this case, with costs against Bachun."

Mr. *Leith* for the appellant contended that, on the evidence, which was examined at great length, there was proof not only of the agreement to fix the dower at the sum of Rs. 40,000 and a gold mohur, but as to that being the common custom in Behar. Several cases appear in the books in which that sum appears to be usual: *Musst. Hukcemun v. Meer Kubeer Hos-*

(1) In the judgment of the Privy Council this amount is said to have been 500 dirms.

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sein (1), *Shaik Futteh Ali v. Musst. Janwa* (2), and *Abdul Karim v. Mussamut Fasilat-un-nissa* (3). The Judges of the High Court seem to admit that the amount of dower was large, but they do not follow it up and ascertain the amount. So long as her dower is unpaid, the widow is entitled to a lien on her husband's property—*Mussamut Janee Khanum v. Mussamut Amatool Fatima Khanum* (4) and *Ameer-oon-Nissa v. Moorad-oon-Nissa* (5). The heirs are not entitled to any share until the dower, which is a debt, has been paid: and the proper decree in such a case as this, where the widow is in possession and claims dower, is to have an account taken, and a declaration made that, after payment of the widow's dower, the residue be divided among the next of kin.

Mr. Cave and Mr. H. Smith for the respondents.—There are two decisions of the Courts below against the appellant on a question of pure fact: the land being shown to be Villayat's, and the respondents being heirs, the widow cannot claim to hold the land against them without proper proof of her dower, and this she has failed to prove, and this tribunal will not review the decisions when concurrent in fact—*Naragunty Lutchmeedavamah v. Vengama Naidoo* (6), *Mussamut Jariut-ool-Butool v. Mussamut Hosseinee Begum* (7), *Meethun Bebee v. Busheer Khan* (8), and *Tareeny Churn Bonnerjee v. Mailand* (9). But even if the question is entertained, the findings of the Courts were right. It is well known that enormous sums are often fixed by comparative paupers as the dower of their wives, and evidence of custom therefore as to amount is of no value. The question is what was agreed upon with the intention of being paid. It is a mistake to consider that a widow has a lien over her husband's property for dower—*Bibee Selamut v. Shaik Mowla Buksh* (10)? the only case in which she may hold her husband's property is where there is express or implied assent on the part of the heirs.

(1) 7 Sel. Rep., 81.

(2) 6 Sel. Rep., 178.

(3) 5 Sel. Rep., 75,

(4) 8 W. R., 51.

(5) 6 Moo. I. A., 211.

(6) 9 Moo. I. A., 66.

(7) 11 Moo. I. A., 194.

(8) *Id.*, 213.(9) *Id.*, 339.

(10) 5 W. R., 194.

Their LORDSHIPS' judgment was as follows :—

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The principal questions in these appeals arise from a claim made by the appellant, as the widow of Sheikh Villayut Aleé, a Mahomedan, to a dower of Rs. 40,000 and one gold mohur, and a further claim on her part to retain possession of lands belonging to her late husband until her dower is satisfied. Other claims have been made by the parties in these suits, some of which have been included in the present appeals, and to which it will be necessary hereafter to advert.

The appellant and Sheikh Villayut Aleé, who both appear to have belonged to wealthy Mahomedan families in Behar, were married in 1820. The husband died in March 1851 without issue, leaving the appellant his only widow. It is not now disputed that, on his death without issue, the appellant became entitled as co-sharer to one-fourth share of her husband's estate, and that the other three-fourths descended upon Mussamut Raheebun, a sister of Villayut Aleé, who died shortly after her brother, leaving the present respondents her heirs.

In April 1851, proceedings were instituted by the appellant in the Collectorate Court to obtain the entry of her name in the register in place of her husband's. She alleged her in petition that she was in possession by right of inheritance, and also on account of her dower. Objection was made on the part of the respondents, but it did not prevail : and the lands were registered by the Collector in the name of the appellant "without specification of share." An appeal was made on behalf of the respondents to the Commissioner, who affirmed the decision of the Collector, declaring in his order that, if the objectors (the respondents) had any claim, they were at liberty to find their remedy by suing in the Civil Court. The order of the Commissioner bears date the 11th March 1852. These proceedings relating to the possession of the lands are material, not only to show that the appellant obtained the insertion of her name and possession soon after her husband's death, but principally because it is clear from them that she claimed to hold, not merely her one-fourth share to which she was entitled as co-sharer with the heirs, but the entire estate "on account of her dower." The respondents, who were parties (objectors) in these proceedings,

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notwithstanding that they had the fullest notice of the appellant's pretension to hold the estate for her dower, took no step to dispute her claim, or to disturb her possession of the entire estate, from the date of the above proceedings until the commencement of the present suits, a period of nearly ten years.

On the 31st December 1862. both the suits, which are the subject of these appeals, were commenced, one by the respondents as the heirs of Mussamut Raheebun (deceased), sister and heiress of Villayut Alee, against the appellant (the widow) to recover three shares of the estate, admitting her right as widow to one-fourth share. The other was a suit by the appellant against the respondents to establish her claim to dower, on the alleged ground that her claim to dower might otherwise be barred by the law of limitation. The appellant in both suits asserted that the dower agreed to be given on her marriage was the sum of Rs. 40,000 and one gold mohur, and she claimed to hold the estate until this dower was paid : whilst the respondents alleged that, in the family of Villayut Alee, the dower was always fixed at 500 'dirms, and that this was the agreed amount of dower on this marriage. The claim of Mussamut Baohun to hold the property to satisfy her dower cannot be founded upon an original hypothecation of the estate for her dower,—for such a right does not arise by the Mahomedan law as a consequence of the gift of dower, nor was there any agreement on the part of the husband to pledge his estate for the dower. But the appellant having obtained actual and lawful possession of the estates under a claim to hold them as heir and for her dower, their Lordships are of opinion that she is entitled to retain that possession until her dower is satisfied, and that the respondents cannot recover the possession of their shares, unless that satisfaction has taken place. It is not necessary to say whether this right of the widow in possession is a lien in the strict sense of the term, although no doubt the right is so stated in a judgment of the High Court in a case of *Ahmed Hossein v. Mussamut Khadija* (1). Whatever the right may be called, it appears to be founded on the power of the widow, as a creditor for her dower, to hold the property of her husband, of which she has lawfully.

(1) 3 B. L. R., A. C., 23 ; in foot note.

without force or fraud, obtained possession, until her debt is satisfied, with the liability to account to those entitled to the property subject to the claim, for the profits received. This seems to have been the ground on which the claim of the widow to retain the possession was put in *Ameer-oon-Nissa v. Moorad-oon-Nissa* (1). Whether the dower in this case has been discharged out of the proceeds of the estate, must, of course, depend on the determination of the principal question in the cause,—what is the amount of the dower?

The question raised in the second issue in the dower suit was, whether the dower was fixed at Rs. 40,000 and one gold mohur, as alleged by the widow, or at 500 dirms, under the Mahomedan law, as contended for by the respondents? In the possession suit, the issue (4th) was whether Villayut Allee owed Mussamut Bachun Rs. 40,000 and one gold mohur for dower or not? After a great deal of evidence had been given in the suits, the Principal Sudder Ameen held that the appellant had not made out that the dower was fixed at Rs. 40,000; and he also held that the statement of the respondents that the dower was fixed at 500 dirms “was conjectural.” On the appeal the Judges of the High Court were of opinion that they could not declare that the appellant was entitled to demand “the immense sum of dowry which she claims;” but they say,—“in a Mahomedan marriage between contracting parties of rank and influence, there must be of course some dowry, and it was probably a handsome one.” They also say:—“The omission of the defendants to sue for their share of the inheritance indicates a consciousness on their part that Bachun had a claim for dower to be satisfied from the estate: and as the amount of dower was doubtless considerable, though we cannot declare what the exact amount was, we think that, under the circumstances of the case, it will be just and equitable, to order that the defendants receive no mesne profits, except what has accrued since the institution of their suit. With this modification we confirm the judgment of the lower Court in this case, with costs against Bachun.” Their Lordships are unable to consider this judgment of the High Court as a final or satisfactory determination of the

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main question in the suit. The Learned Judges, whilst holding that the evidence did not satisfy them that the dower was fixed at Rs. 40,000, declare that it "was probably a handsome one," and that the conduct of the respondents indicates that it was "doubtless considerable." It appears to their Lordships that the widow, on the view taken by the High Court, was, at all events, entitled to a proper dower, to be ascertained according to Mahomedan law. But no attempt was made to arrive at what would be the proper dower, nor was any account taken of the proceeds of the estate. It is obvious, therefore, that the Court has set-off one unascertained sum against another unascertained sum. It seems to their Lordships that this mode of settlement, if suggested to the parties as a compromise, might perhaps have been, with their assent, a fit end of the litigation; but they think it cannot properly be made the basis of a decree between hostile litigants, and, therefore, that the decree so founded ought not to stand in its present shape. Their Lordships, in this state of things, have thought it right to look carefully at the evidence, to see whether they can safely arrive at a conclusion which would prevent the necessity of renewed litigation; and whilst fully alive to the importance and propriety of their ordinary rule not to interfere, unless upon very clear grounds, which the findings upon questions of fact, where the Courts of first instance and of appeal have been in accord, they think this case comes before them under exceptional circumstances, there being in truth no explicit finding upon the question of the amount of dower.

The appellant called nine witnesses who were present at the marriage ceremony in 1820, and these persons say that the dower agreed to be given was a deferred dower of Rs. 40,000. About an equal number of witnesses called by the respondents, some of whom also say they were present at the marriage, state that the dower was fixed at 500 dirms. It is clear from the evidence that Villayut and Bachun were both "in opulence from the time of their fathers," and it is consequently more probable that a high sum was fixed than such a low sum as 500 dirms, indeed, the learned Judges of the High Court came to this opinion. Their Lordships would have hesitated long

before holding that the appellant had established her right to the dower she claimed, if the proof had rested only on the oral testimony of the contract; but they think that that testimony receives very strong support and corroboration from the evidence given of what was usual in the district, and also from the conduct of the respondents themselves. The evidence of what was customary, principally came from the respondents' witnesses, and its truth may therefore be relied on. It shows that, in the province of Behar, and in the cast of Sheikhs, Rs. 40,000 was amongst wealthy people the usual dower. This amount was not invariable, but it was a very common and usual sum, and numerous instances are cited by the witnesses. One witness, Sheikh Shahamut Alee, says:—"In the cast of Sheikhs, in the province of Behar and in Mahoonnee, the custom is usually Rs. 40,000 and one gold mohur, and the custom of inconsiderable dowers is of recent date." It was pointed out by the learned Counsel for the respondents that, in some instances, this large amount of dower was fixed in marriages between persons, who, apparently, were not wealthy; but this circumstance rather tends to corroborate the evidence that it was a usual and well-known dower than to rebut it. Three cases, also coming from Behar, were referred to from the reports of the "Sudder Dewanny Adawlat," where this sum of Rs. 40,000 was the amount of dower. These instances cannot, of course, be regarded as evidence in the cause, but as matter of history they are consistent with the testimony of the witnesses. Their Lordships must not be understood to decide that the evidence of what was customary in the district would be sufficient in itself to fix the amount of dower; for if there had been no evidence of an agreed amount, it would have been necessary to make enquiries into the usual amount of dower in the family of the appellant; but it is impossible not to see that this sum of Rs. 40,000 was a most usual amount to be fixed, and that fact gives probability to the statements of the witnesses for the appellant, who proved that such was, in fact, the dower agreed upon on this marriage. Their Lordships are also disposed to attribute great weight to the presumptions which naturally arise from the conduct of the respondents. It is plain that, from the pleadings

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in the Collector's Court and from other transactions, they became aware shortly after Villayut's death of the claim for dower, and although they opposed the widow's claim to possession, showing they were alive to their rights, yet after she had obtained it, they took no step for ten years to interfere with her possession. The proper inference from this conduct is that they were aware that she had a claim to a large dower, certainly to an amount far beyond the insignificant sum of 500 dirms, which they now set up, and which, of course, must have been discharged long ago, and that they acquiesced in her holding the property for that larger dower. Knowing what her claim was, if they had wished, to dispute it, and to have the real amount ascertained, they might at any time have instituted a suit to obtain the possession of their shares of the estate, if the dower should appear to have been discharged. But they delayed doing so for ten years, thereby rendering the proof of the agreed dower more difficult, and perhaps relying upon that very difficulty. Whilst the Judges of the High Court treat this conduct of the respondents as indicating a consciousness on their part that the dower had been fixed at a considerable amount, they do not seem to have drawn the further inference which we think may be fairly done, that it is also indicative of a consciousness on their part that what the appellant asserted to be the amount was the true and proper amount; for if that were not so, it might reasonably be expected that they would have taken proceedings at an earlier period to dispute her claim. In the result their Lordships have come to the conclusion that there was an agreed amount of dower on the marriage; and they are satisfied, concurring so far with the Courts of India, that the amount of dower set up by the respondents has been disproved. Their Lordships further think, for the reasons given, that there is reasonable evidence to support the case of the appellant to the dower she claims.

The appellant also objected to the decree in the suit for possessions, because certain tenements alleged to be her private property (in addition to the two tenements found by the Courts below to belong to her) ought to have been declared to be hers. But no evidence could be referred to by the appellant's

Counsel in support of this contention, and there seems to be no ground for impeaching the concurrent decrees of the two Courts on this point.

Their Lordships will humbly report to Her Majesty that the appeals should be allowed in both suits, so far as they relate to the claim for dower ; that the decrees under appeal should be reversed ; and that it should be declared in both suits that the dower agreed to be given on the marriage was the deferred dower of Rs. 40,000 and one gold mohur.

With regard to the suit for possession, their Lordships have considered whether they ought to advise her Majesty to direct an account to be taken in that suit ; but considering the way in which the litigation has been conducted, that no account has ever been asked for by the respondents, and that mesne profits were not even claimed in the suit, they think it will be more convenient to follow the course taken in the case of *Ameer-oon-Nissa v. Morad-oon-Nissa* (1), and to advise Her Majesty that that suit, so far as it prays possession, should be dismissed as against the appellant, without prejudice to any suit that may be instituted by the respondents for an account, and administration of Nillayut Alee's estate, consistently with the above declaration as to the appellant's dower.

Their Lordships are further of opinion that the order to be made in the appeal should, as far as possible, provide against the re-opening of any of the questions which have been litigated in these suits : the order, therefore, which they will humbly recommend Her Majesty to make will be the following :—

That the appeal be allowed, and that the decrees under appeal be reversed, and the following decree be made in both suits :—

That it be declared that the dower agreed to be given on the marriage of the appellant with Sheikh Villayut Alee, deceased, was the deferred dower of Rs. 40,000 and one gold mohur ; and that the appellant, being in the possession of the estates of the said Villayut Alee, is entitled to retain such possession until the whole of what is due to her in respect of such dower has been paid and satisfied ;

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that it be further declared that the whole of the property claimed in the suit wherein the respondents are plaintiffs, with the exception of Monzah Poondareek and Monza Kurareea, and the sum of Rs. 300 in the decree of the Principal Sudder Ameen mentioned, belonged to and formed part of the estate of Sheikh Villayut Alee, deceased; and that the respondents, as the representatives of Mussamut Raheebun, deceased, are entitled to three-fourths of the said property, subject to the claim thereon of the said appellant in respect of her before-mentioned dower;

that it be ordered that the suit of the said respondents, so far as it seeks to recover possession of their shares of the said estate, do stand dismissed as against the appellant, but without prejudice to any suit that may hereafter be instituted by them for an account and administration of the estate of Villayut Alee, or to enforce their rights therein consistently with the above declarations:

that the costs of both the said two suits in the Zillah and High Courts should be apportioned between the parties, according to the practices of those Courts in cases wherein a litigant is only partially successful; and that the costs (if any) which have been paid by the appellant under the decrees under appeal should be repaid to her;

that the causes be remitted to the High Court, with directions to carry out this order.

The appellant having failed as to part of the subjects of her appeal, no costs will be given in this appeal.

Appeals allowed.

Agent for appellants: Mr. *Wilson*.

Agent for respondents: Messrs. *Watkins and Lattey*.

[ORIGINAL CIVIL.]

Before Mr. Justice Markby.

NEERUNJUN MOOKERJEE v. OOPENDRO NARAIN DEB.

1872
Aug. 23.*Money-decree in Suit for Foreclosure or Sale—Effect of Note appended to Decree varying Decree—Practice—Affidavit filed after Adjournment for Convenience of Counsel, Admissibility of.*

A mortgagee sued for foreclosure or sale in the usual form. The suit was undefended. The plaintiff elected to take a simple money-decree against the mortgagor. The following words were appended to the decree :—“*Note.—The equity of redemption in the property comprised in the mortgage is not liable to attachment and sale under this decree.*” After ineffectual attempts to realize his debt, the plaintiff applied to the Court for liberty to sell the mortgaged premises. *Held*, that the Court had a discretionary power to grant or refuse the sale. The note at the end of the decree did not amount to an absolute prohibition against the sale, but was merely meant as a guide to the Court which should have to execute the decree, and to show that execution should not issue against the equity of redemption, except by special leave of the Court.

The Court made an order as if there had been a decree for sale in the first instance, except that the account was to be treated as a final account at the date of the decree.

In this case the plaintiff had instituted a suit on a mortgage-deed, praying, in default of payment of the money secured thereby, for a foreclosure or sale of the mortgaged premises. The plaintiff, however, believing that the defendant was possessed of other property which he could immediately attach, and thereby obtain satisfaction of his debt, elected to take a simple money-decree. The decree was as follows :—

“It is ordered and decreed that the defendant do pay to the plaintiff the sum of Rs. 19,154-7-9, with interest thereon, at the rate of 6 per cent. *per annum*, from the 13th day of September last until realization; and do also pay to the plaintiff his costs of this suit (to be taxed by the taxing officer as between attorney and client under the heading ‘Class 1, Short Causes’), with interest thereon at the rate aforesaid from the date of taxation until realization; and it is further ordered that execution of this decree do not issue until the mortgage-deed in the plaint mentioned be brought into Court. (*Note.—The equity of redemption in the*

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property comprised in the mortgage is not liable to attachment and sale under this decree)."

The plaintiff found some difficulty in executing this decree and realizing his money, and accordingly petitioned for an order that the mortgaged premises might be sold by the Court, and that all further directions might be given for that purpose. The learned Judge directed the plaintiff to give notice of the application to the defendant and to renew it upon such notice.

Mr. *Goodeve*, on the 10th February 1872, applied on behalf of the plaintiff, upon notice to the defendant, for an order "that the mortgaged premises mentioned in the plaint in this suit may be sold by this Honorable Court, and that all further necessary directions may be given for that purpose."

Mr. *Evans*, for the defendant, opposed the application. He contended that the notice was unintelligible, or, if it meant anything, it was an application for the ordinary decree for sale, which was a varying of the decree to which he could not consent.

MARKBY, J., dismissed the application. His order was in the following terms:—

"That the application of the plaintiff, pursuant to the said notice, dated the seventh day of February instant, for an order that the property comprised in the mortgage in the plaint mentioned may be sold, be, and the same is hereby, refused with costs, to be taxed by the taxing officer and paid by the plaintiff to the defendant."

After the dismissal of the application, the plaintiff obtained a writ of attachment against the person of the defendant, but the writ was returned unexecuted. The plaintiff then obtained a certified copy of the decree for execution in the Zillah Court of Hooghly, but this also remained unexecuted. The plaintiff thereupon presented another plaint on the mortgage, setting forth the above facts, and praying for an account, and for payment by the defendant to the plaintiff of what might be found due on such account and in default of payment for foreclosure; but Macpherson, J., refused to admit the plaint on the ground that the plaintiff's claim had already been disposed of. The plaintiff

appealed against the order rejecting the plaint. The appeal was heard by Couch, C.J., and Markby, J.

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Mr. *Woodroffe* for the appellant.—The first plaint set out the claim under the mortgage; it did not pray for a decree on any covenant in the mortgage. [Couch, C.J.—Why could the plaintiff not have taken the mortgaged premises in execution?] Because it was part of the decree that he should not do so without bringing the mortgage-deed in to Court. It was one of those notes appended to the decree which have recently become common, but of which the legal effect is doubtful. The practice, no doubt arose in consequence of mortgagees pressing all their remedies at once. [MARKBY, J.—I think you are mistaken as to the effect of the note to the decree; its object is to prevent the plaintiff avoiding an account.] It is true that this is a suit on the same cause of action as the former one, but that cause of action was not adjudicated upon. Couch, C.J.—As a general rule, if a suit is so framed that the plaintiff may have a certain decree, and he chooses not to take it, he cannot sue again.] It is different in the case of a mortgage; the mortgagee may pursue all his remedies simultaneously. In the present instance, the plaintiff elected to take a money-decree, but the judgment did not determine his right to the other remedies. [Couch, C.J.—Could you not escape from your difficulty by obtaining special leave to attach the property on notice to the defendant? Perhaps this appeal had better stand over till you have made that application.]

The appeal was accordingly adjourned, and subsequently

Mr. *Woodroffe*, on behalf of the plaintiff, and upon notice to the defendant, applied before Markby, J., for an order to enable the plaintiff to execute the decree by the attachment and sale of the mortgaged premises (the plaintiff being willing to consent to a sale with the approbation of the Registrar of the High Court, if the defendant would consent thereto), or for such other order as the Court might be pleased to grant.

Mr. *Kennedy*, for the defendant, opposed the application on the ground that the Court could not thus vary its decree. If there

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had been an order for sale, the Court might have made a personal decree for the balance, but the natural and ordinary remedy was by foreclosure. A Court of Equity will not sell mortgaged property without allowing the mortgagor a reasonable time to redeem. Mortgaged property ought not to be made the subject of a money-decree. Relying upon that principle, the defendant did not defend the suit. [The learned Counsel proposed to read an affidavit filed by the defendant on the 8th of August, *Mr. Woodroffe* objected. The motion was fixed for August 2nd, and stood over for *Mr. Kennedy's* convenience. The affidavit contained charges of fraud: and the plaintiff had no notice of it; it cannot, therefore, be referred to—*Courjon v. Courjon* (1). *Mr. Kennedy*.—That was an affidavit in reply. (*Mr. Woodroffe*.—No, it was used to support the original affidavit.) *Mr. Kennedy* did not press the point, but continued.] The cases have gone so far as to show that an equity of redemption cannot be attached under an ordinary money-decree—*Ramlocham Sirkar v. Sreemutty Kaminee Debee* (2), and *Brajanath Kundu Chowdhry v.*

(1) 9 B. L. R., App., 10. [It should have been stated in the report of that case that there also the hearing had been adjourned for *Mr. Kennedy's* conveyance and that the affidavit which he sought to read had been filed after such adjournment.]

(2) *Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Markby.*

timated its opinion upon the main question raised before us, *viz.* whether the injunction restraining the plaintiff from proceeding to a sale of the right, title, and interest of the defendant, under the decree of this Court of the 28th July 1862, until further orders, ought to be set aside. The learned Judge who made the order of the 4th of July also issued the order for the injunction.

The 22nd May 1868.

RAMLOCHUN SIRKAR (PLAINTIFF) v.
S.M.KAMINEEDEBEE (DEFENDANT).

Appeal from the judgment of Norman, J., dated 26th September 1867 (a).

The Advocate-General for the appellant.

Mr. Kennedy for the respondent.

The judgment of the Court was delivered by.

PEACOCK, C.J.—The Court, at the conclusion of the argument yesterday, in-

The order is to restrain the appellant from further proceeding under the order of sale and the decree made in the cause. It has been argued that the effect of it is to restrain the plaintiff not only from proceeding to sell under the order of the 4th July 1867, but also from proceeding under the decree of the 25th September 1865; and it was contended that the Court had no jurisdiction to restrain the plaintiff from proceeding under the decree without a suit to set aside the

(a) 5 B. L. R., 460, in foot-note.

S. M. Gobindman's Dasi (1). But even if the cases cited show that the Court has a discretionary power, it will not

decree. It is now admitted, on the part of the defendant, that the injunction was not intended to restrain the plaintiff from taking proceedings under the decree, and therefore we will treat it as if it clearly expressed, what I think it did express, *vis.*, that it was intended merely to restrain proceedings under the order of the 4th July. It is quite clear that the Court had power by order to stay proceedings under the order of the 4th July 1867 without a suit for that purpose, and if it could restrain the proceedings by an order, it might do so by an order for injunction without a suit, and we ought not to reverse that order upon a mere matter of form.

That brings us to the question whether there are sufficient grounds for restraining further proceedings under the order of the 4th July. It is an order to sell the right, title, and interest of the defendant under a decree of this Court. The interest in that decree had been mortgaged to the plaintiff by a deed dated the 28th October 1859. By that deed the right, title, and interest of the defendant in the property, which was the subject of the suit, and in the decree for account which had been obtained, and in all decrees which should be obtained in that suit subsequent thereto, were mortgaged to the present plaintiff; so that what the plaintiff wishes to be sold is merely an equity of redemption in the decree of 1862.

It is unnecessary to determine whether the Court, in the exercise of a sound discretion, would have allowed the plaintiff to sell the interest of the defendant in that decree, if there had been no mortgage. I think it clear that the Court ought not to allow a mere equity of redemption in that decree to be sold. There can be no doubt that, if that equity of redemption were exposed to sale, and the plaintiff were to give notice in the auction-room of his mortgage, the equity of redemption would sell for nothing; and

the Court ought not, in my opinion, to allow the defendant's interest to be jeopardized by allowing the plaintiff to proceed to sell the equity of redemption. Under these circumstances, it appears to me now, as it appeared to me yesterday, that the learned Judge was right in ordering the injunction, and that order ought to be affirmed.

I was doubtful yesterday whether it ought to be affirmed with costs or not. I must confess that, looking to the affidavit of Mr. Gillanders that he himself in one case, and he and his partner in another, had obtained two decrees against the defendant for large amounts, and that it had been mutually agreed between him and the plaintiff that neither of them should execute their decrees against the defendant, but that they should both wait for payment of their respective demands under the decree of the 28th July 1862;—looking to that fact, and further looking to the fact that negotiations were going on between Mr. Gillanders and the plaintiff up to the 20th of August for the purpose of preventing the plaintiff from proceeding to sell on the 22nd of August under the order of the 4th of July, I did think that the application for the injunction, which was made in consequence of the representation made by the defendant in person to Norman, J., on the 22nd of August was made not for the purpose of protecting the interests of the defendant, but for the purpose of protecting those of Mr. Gillanders. If it had appeared that this application was made substantially by Mr. Gillanders for his own benefit, and not upon the retainer of the defendant, I should have thought that the order ought to be affirmed without costs. We, therefore, gave Mr. Gillanders an opportunity of making an affidavit, or of being examined *videlicet*, as to the circumstances under which the application for injunction was

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(1) 4 B. L. R., O. C., 88.

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exercise that discretion in the present instance. The plaintiff voluntarily took a decree in this particular form in order

made. The examination and cross-examination have gone very far beyond that point: but as Mr. Gillanders is an attorney of this Court, I was anxious that he might set his character clear with reference to his conduct in the suit in which the decree of 1862 was pronounced, as well as in that in which the present order was made. I did not think it right therefore to stop the examination. The evidence which has been given is not sufficient to enable me to express any opinion upon many of the subjects which have been brought forward; nor can I say whether the arrangement which Mr. Gillanders was anxious to bring about with Ramlochan Sirkar was for the interests of the defendant. It is not necessary for me to express any opinion on those points. I do not see anything sufficient to enable me to say that Mr. Gillanders was violating his duty towards his client. There is one matter however upon which, I think, Mr. Gillanders acted very improperly; and that was in taking an *ijdra* from the Receiver of this Court of property which was the subject-matter of a suit in which he was acting as solicitor for one of the parties. That *ijdra* was not taken openly in his own name, but in the name of a clerk or cashier in his office. Mr. Gillanders states that he did mention to one of the clerks of the Receiver that he was the person beneficially interested in the *ijdra* but it does not appear that he mentioned that fact to the Receiver himself, or that the Receiver was aware of it from first to last. Mr. Gillanders states that it was a condition that the Receiver was not to put the *ijdraddar* into possession; that he had to bring a suit in the mofussil to obtain possession; that he obtained a decree, which was afterwards reversed in the High Court; that, in consequence, he never got possession of the property and that he had to pay three years' rent at the rate of Rs. 2,530 a year, in addition to the costs of the suit

which he instituted. He swears positively that all these moneys were paid by himself: that he has not been repaid the amounts; and that he has no claim against any one in respect of them. Still the course which he adopted in taking that *ijdra* is not the less objectionable. Upon the main question, Mr. Gillanders has satisfied me that the application which the defendant made to the Court on the 22nd August 1867 was not made at his instance; that he had advised her brother and her mooktear that, in his opinion, an application of the kind would not succeed; and that they then stated that they would make it themselves. He says that they asked him to allow a clerk in his office to make a copy of an English petition which they had got, and that he gave his consent. He says that after the application to Norman J., he was sent for by the Judge as being the attorney of the defendant Kaminee, that she was in Court at the time he arrived; and that Norman J., asked the lady if she had any attorney, and that she said Mr. Gillanders was her attorney, and he accordingly undertook the proceedings in the matter. I, therefore, look upon this substantially as an application, made on behalf of the defendant. Under these circumstances she is liable to her attorney for the costs in this matter, and I, therefore, think that the ordinary rule should be followed, and that the order being affirmed, it ought to be affirmed with costs. The order, however will be modified by striking out the words "and in the decree made in the same, dated the 21st day of September, 1865."

It is true that the defendant endeavors to impeach the judgment of 1865, and she charges that the plaintiff did induce her not to set up any defence to that action; but her application did not rest upon that ground alone,—it rested also upon the ground that, if the plaintiff were allowed to proceed to sell her rights and interests in that decree, it

to get more speedy execution than he could otherwise have done, and it was a condition of the decree that the property would be highly injurious to her interests, and it appears on the affidavits in the case that the order of 4th July 1867 was obtained by the plaintiff without his bringing to the notice of the Court that the interest which he was about to sell was merely an equity of redemption in the decree. It was discretionary in the Court to order a sale or not; and if all the facts had been brought to the notice of the Court, I think it would not have ordered a sale of the equity of redemption in the decree. I do not think that the defendant, under the circumstances of the case, ought, to be deprived of her costs of this appeal upon the ground of her having endeavoured to impeach the judgment of 1865.

It is not necessary to decide this question upon any other grounds than those I have mentioned. I, however, think it right to mention that, in my opinion, there is very great doubt, whether, in the present case, the prohibitory order of the 19th June 1867 was correct. It is clear that the right, title, and interest of the defendant in the decree of 1862 was not a mere debt. The decree declared her right in immovable property, some of which at least was not of the local limits of the ordinary original jurisdiction of this Court. The Sheriff, under a writ of execution from this Court, could not have attached the interest which the decree declared the defendant to have in the property in the 24-Pergunnahs. The prohibitory order is merely in the nature of an injunction to her, which possibly might have been issued against her as being in the jurisdiction of this Court, commanding her not to alienate her interests under the decree of 1862. It appears to me that it was not an execution. If it was merely an injunction and not an execution, there was no authority for issuing the order of sale of 4th July 1867. Act VIII of 1859, s. 221,

enacts, "that when all the necessary preliminary measures have been taken, where any such are required, the Court, unless it see cause to the contrary, shall issue the proper warrants for the execution of the decree." The Act proceeds in s. 223: "If the decree be for a house, land, or other immovable property, in the occupancy of a defendant or of some person on his behalf, or of some person claiming under a title created by the defendant subsequently to the institution of the suit, the Court shall order delivery thereof to be made, &c;" and so with regard to properties of other descriptions; so that for an attachment it is necessary that a writ or a warrant should issue.

With reference to the jurisdiction of this Court, it is directed by the Charter that all writs issued out of the Court should issue in the name of the Queen; and an order of this sort restraining the defendant from alienating under the decree, though served by the Sheriff on the defendant at her own house, was not a writ of execution. As an order of injunction restraining her from alienating her equity of redemption, it might be served on the defendant within the jurisdiction of this Court, and it was served by fixing it on the outer door of her dwelling-house; but if it was an execution against the interest which the defendant was by the decree declared to have in the immovable property, it ought to have been attached by a notice fixed on the property itself, the subject-matter of the execution, and that could not have been done by the Sheriff, because it was beyond the jurisdiction of this Court. It could have been done only by an officer of the Court of the 24-Pergunnahs where the land was situate under an execution of the decree of this Court upon its being sent there for execution under the provisions of Act VIII of 1859, s. 284, and the following sections (a).

(a). A report of the judgments on appeal in the case of *Troyluckmohun Tagore Gobind Chunder Sen*, referred to by Norman, J., in his judgment in this case, will be found in the *Englishman* Newspaper of the 17th [February 1863. There are notes only of the judgments in the Registrar's office.

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should not be sold; that was part of the decree, and was absolute and final: the plaintiff, when he took the money-decree, bound himself to relinquish his rights over the property. The order now prayed for would, if granted, be a great hardship on the defendant. A sale under attachment by the Sheriff is very different from a sale by the Registrar under decree. Even if the Court now saw its way to altering the decree, it could only do so by putting all parties on the footing on which they would have been if the decree had originally been for sale. Another objection to the order is that execution has already issued under the decree both against the person and against other property of the defendant.

Mr. Woodroffe in reply.—(His Lordship intimated that the learned Counsel need only address his argument to the question as to whether the Court was bound by the note appended to the decree.) Neither Peacock, C.J., in *Ramlochan Sirkar v. Sreemuttu Kaminee Debes* (1), nor Phear, J., in *Brajanath Kundu Chowdhry v. S. M. Gobindman Dasi* (2), go the length of saying that the equity of redemption cannot, under any circumstances whatever, be sold; nor, in fact, is there any authority for such a doctrine: on the contrary, there is a large number of cases in which rights arising out of an equity of redemption have been dealt with. Nor is there anything in Act VIII of 1859 which prevents the Court from selling the equity of redemption when the mortgagee is the party who is plaintiff. The words, therefore, in the note to the decree cannot mean that the Court has not the power to sell, nor can they mean that under no circumstances will the Court make an order for sale, because if it were so, it might happen, if the plaintiff chose to sue on the covenant in the deed, and the defendant had no property besides the mortgaged property, that the plaintiff's right would be defeated; but it is perfectly clear that the mortgagee may press all his remedies at one and the same time. This note forms no part of the decree; it is simply intended to show that the equity of redemption cannot be

(1) *Ante*, p. 60.

(2) 4 B. L. R., O C., 83.

attached or sold without the special leave of the Court ; see *Mackinnon v. Gunnes Jhunder Ghose* (1).

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MARKBY, J.—This is an application made by the plaintiff to obtain execution of a decree by sale of the equity of redemption of certain property of which he is the mortgagee, the decree which he seeks to execute having been obtained in respect of the mortgage-debt in a suit which asked in the alternative for a decree for foreclosure or sale. He has made other ineffectual attempts to realize his money, and has now come back on his original decree. The decree is in the usual form of money-decrees, but at the end of it is this note, which is described as a note in the decree: "The equity of redemption in the property comprised in the mortgage is not liable to attachment and sale under this decree." Now, the first objection taken on the part of the defendant is, that, quite independent of that note, as a rule of law governing this Court, the equity of redemption is not saleable upon a money-decree obtained by a mortgagee in respect of his mortgage-debt. I think that that contention must be considered by me as disposed of; for the purposes of this case at least, by the observations of Peacock, C.J., in the appeal case of *Ramlochan Sirkar v. Sreemutty Kaminee Debee* (2), to which reference has been made. I sat with the Chief Justice in that case, and whether or no that particular observation of the Chief Justice was assented to by me does not appear, but at any rate I should act upon it for the purposes of this case. It was a considered observation, and is not at variance with any decided case. The Chief Justice distinctly says, after noticing that the property which the mortgagee sought to sell was the equity of redemption, that it is discretionary with the Court to grant or refuse the sale.

Then it was objected by Mr. Kennedy that, whether that be so or not, the note which I have read is an absolute prohibition so far as this case is concerned, against the sale of the equity of redemption in execution. In his argument he seemed disposed to put it so high as an undertaking on the part of the plaintiff

(1) 1 L. J. N. S., 370

(2) *Ante*, p. 60.

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not to proceed against the mortgaged property, or at any rate as a consent by the plaintiff to that. I don't think I can treat it as that. It does not appear that the Court, at the time the case was before it, in any way intimated that that undertaking should be required; and the mere fact that the minutes of the decree were shown to the plaintiff's attorney, and assented to by him, does not imply any consent to the terms of the decree, but merely that the decree is drawn up as it ought to be drawn up with reference to the judgment of the Court; and it leaves the question as to the true construction of the note still open. I had some doubt during the argument upon that point. It seems to me, however, that the proper construction to put on it is that it does leave some discretion to the Court. The opinion which I have expressed upon the first point, I think, assists us to come to a conclusion on this point also. If it is discretionary with the Court, as the late Chief Justice says it is, either to grant or refuse execution by attachment and sale of the equity of redemption, it certainly would be strange if the Court, when granting the original decree, were absolutely to take that discretion away from the Judges who might be called on to execute the decree. The meaning of the late Chief Justice must be that in some cases it would be proper to execute the decree in that form, and in other cases not. The Court, at the time it passed this decree, had not, and could not have had, the circumstances before it which would enable it to say how that discretion should be exercised. It therefore seems to me that it would be improper for the Court to do that which amounted to taking away a discretion, which by law, according to the case which has been referred to, does exist. I think, therefore, that the more reasonable construction to put upon this clause is that contended for by Mr. Woodroffe, viz., that it was only meant as a guide to the Court which should have to execute the decree; and that, in this case, execution was not to issue against the equity of redemption as a matter of course, but only subject to the special order of the Court,

Then comes the question how this discretion should be exercised in this case. It is said that there was something in the nature of bad faith on the part of the plaintiff in asking

for a decree in this form. When Mr. Kennedy referred to his client's affidavit, the decision in *Courjon v. Courjon* (1) was not before me: but without deciding whether that affidavit can be read or no, I consider that there is nothing in it to show why execution should be refused. The only ground stated is that the plaintiff had some idea of escaping the ordinary results of a decree for foreclosure or sale by getting a money-decree. I do not think it is reasonable to conclude that; because the plaintiff, or the persons who were advising him, must have known what extreme difficulty there is in this Court for a mortgagee to obtain execution on a money-decree against the mortgaged property. I think I ought not, even if I look at the affidavit, to give any weight to it— the more so as the plaintiff has had no opportunity of denying the statement.

The next point is whether I should order execution *simpliciter* by attachment and sale of the mortgaged property, or take the course which has been proposed by the plaintiff. Mr. Woodroffe very fairly admits that the defendant ought not to be put into any worse position than if a decree for sale had been originally passed. I think the defendant should be put in the same position as if a decree for sale had passed in the first instance, with this exception, that, instead of there being a direction for an account to be taken in the usual way, the account should be treated as a final account at the time of the decree; the plaintiff to be entitled to no more than 6 per cent. interest from decree. On the other hand, I see no reason why the entire period of six months should now be allowed. There will be an order for sale in the terms of an ordinary decree for sale within four months from this date, with provision for the balance, if any, unrealized by the sale. I make no order as to the costs of this application. The plaintiff will have liberty to bid at the sale.

Attorney for the plaintiff: Mr. Hatch.

Attorney for the defendant: Mr. Camell.

(1) 9 B. L. R., App., 10.

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APPELLATE CIVIL.

Before Mr. Justice Markby and Mr. Justice Atalie.

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Sept. 16.

IN THE MATTER OF THE PETITION OF S. J. LESLIE*

Superintendence of High Court—24 & 25 Vict. c. 104, s. 15—Act VIII of 1859, s. 119—Setting aside part of Decree—Jurisdiction.

Judgment was passed *ex parte* against a defendant who had not appeared. The defendant failed to show cause for setting aside the judgment under s. 119 of Act VIII. of 1859. He now applied to the High Court, under s. 15 of 24 & 25 Vict., c. 104, to set aside a portion of the decree as having been passed without jurisdiction. The Court refused to interfere.

THE Land Mortgage Bank of India having sued S. J. Leslie, in the Court of the Subordinate Judge of the 24-Pergunnahs, to recover the amount due under a mortgage, and in default of payment for sale of the mortgaged premises, obtained on *ex parte* decree for the amount claimed with interest and costs, and in default of payment for sale; the decree further directing that in the event of the proceeds of sale being less than the total amount of principal, interest, and costs, the plaintiff should be at liberty to execute the decree for any balance which might remain due against the defendant Leslie or his property. The defendant Leslie subsequently obtained a rule in the High Court, calling on the Land mortgage Bank to show cause why the decree should not be set aside as being made without jurisdiction. This rule was discharged on the 12th July 1872 (1), and Leslie thereupon applied for and obtained another rule, calling upon the Land Mortgage Bank, "to show cause why the decree of the Court of 24-Pergunnahs, made on the 16th of October 1871, should not be set aside in so far as it directed that the plaintiff should be at liberty to execute the decree for any balance that might remain due after the sale of the property covered by the mortgage-deed dated 13th September 1869, and why the proceedings taken in execution of the said decree in the Court of the Judge

* Rule Nisi No. 767 of 1872.

(1) 9 B. L. R., 171.

of Moorshedabad for recovery of such balance as aforesaid should not be quashed."

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The petition upon which the rule was granted stated that, in pursuance of the decree of the 10th October 1871, the plaintiffs (the Land Mortgage Bank) had put up for sale the mortgaged property, and purchased the same themselves for Rs. 10,000 ; that under the said decree the plaintiffs had caused to be attached the rent of the said mortgaged property, and had realized the sum of Rs. 1,500 ; that the costs of suit amounted to Rs. 421-5-3 ; that the plaint was filed at a time when the defendant S. J. Leslie was in no way personally subject to the jurisdiction of the Court of the 24-Pergunnahs ; that he did not work for again within the jurisdiction of the said Court ; that the cause of action did not arise in the 24-Pergunnahs ; and that the said decree, so far as it gave liberty to the plaintiffs to sue out execution against the defendant or his property, other than the mortgaged property, was illegal and made without jurisdiction ; that the plaintiffs had transmitted the said decree to the Zilla Court of Moorshe-dabad for execution, and had issued execution for the sum of Rs. 21,302-13-7 ; and that the amount of rent realized by attachment should be carried to the satisfaction of the costs awarded under the decree.

The *Advocate-General offg.* (Mr. Paul) for the Land Mortgage Bank showed cause.—The suit for sale could only be brought in the Court within whose jurisdiction the land was, and a Court decreeing a sale has power to decree payment of the balance, if any, remaining unpaid after the sale. The petitioner by his failure to appear lost his right to appeal. He cannot by the aid of s. 15 of 24 & 25 Vict., c. 104, be placed in the position which by his own conduct he has forfeited. Further, the matter is concluded by the decision of this Court on 12th July.

Mr. Woodroffe for Leslie.—A decree can be set aside in part, so far as it is beyond the jurisdiction of the Court passing it—*Mannu Lal v. Pegue* (1). This Court came to the conclusion

(1) 9 B. L. R., 175.

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that the 24-Pergunnahs Court had exceeded its jurisdiction; but did not set aside the decree so far as is now asked, because the materials were not then before the Court.

The judgment of the Court was delivered by.

AINSLIE, J.—We held at the former hearing that the Judge had jurisdiction to ascertain the debt due by the petitioner to the Land Mortgage Bank, and to make an order for the sale of the mortgaged property which is situated within the local limits of the jurisdiction of his Court, and to award the costs of the action to the plaintiff. We declined to entertain the question whether the decree should be set aside in part, on the ground that there was nothing before us to enable us to make any declaration as to the extent to which such an order should operate. It is now said that the materials necessary for distinguishing the portion of the decree that ought to be set aside were and are before us, though at that time this fact was overlooked. But it does not follow that we must modify the decree, because it is shown to us that it contains provisions which should not have been embodied in it. This is an application under s. 15 of the High Courts' Act, asking us to proceed under the general powers of superintendence thereby vested in the Court, with a view to supply to the petitioner a remedy in lieu of that which he has lost by his own deliberate act. Under ordinary circumstances the petitioner would have been entitled to an appeal against any decree made by the Judge in the suit, and on such appeal this Court would have had power to confirm, reverse, or modify the decree of the lower Court, and so to make a proper decree in the suit: but s. 119 expressly enacts that "no appeal shall lie from a judgment passed *ex parte* against a defendant who has not appeared," and then proceeds to provide a remedy for a defendant who can establish to the satisfaction of the Court either that the summons to him was not duly served, or that he was prevented by sufficient cause from appearing when the suit was called on for hearing; but it gives no remedy to a defendant who has wilfully or carelessly failed to appear after due service of summons. It has been found both by the Court below and by

this Court that the petitioner failed to make out any right to a re-opening of the case under s. 119, and that he has consequently, by his own omission to attend to the summons, lost his right to appeal against the decree. We are now, in effect, asked to restore to him the benefit of an appeal by dealing with the case under our general powers of superintendence. We do not think we are called on to consider in a proceeding in this form what may be the consequences of the Bank's taking further steps to realize the balance still due under the decree. The question is simply whether we ought to give an extraordinary remedy to a defendant who has deliberately thrown away his ordinary remedy. We think we ought not to do so, and that the rule should be discharged with costs.

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S. J. LESLIE.

Rule discharged.

ORIGINAL CIVIL.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Pontifex.

F. F. WYMAN v. A. BANKS.

1872

Nov. 28 &
Dec. 9.

Libel—Plaint, Rejection of—Ironical Publication—Comment in Newspaper.

On the presentation of a plaint for libel, the Court must see whether the alleged libellous matter set out in the plaint is really libellous; if it is not, there is no ground of action, and the plaint ought not to be admitted (1).

If the words which are set out in the plaint are not a libel, the plaintiff cannot, by alleging that they were printed and published by the defendant with the intent, to injure the plaintiff, and bring him into public scandal and disgrace, and to expose him to public scorn and ridicule, and to cause it to be suspected that the plaintiff was a dishonest person, and had been actuated by sinister and fraudulent motives, make them a libel; nor can the plaintiff by alleging that words are spoken ironically make them libellous if they do not appear to the Court to be so.

APPEAL against an order by Macpherson, J., dated the 23rd August 1872, rejecting a plaint.

The plaintiff sought to recover the sum of Rs. 5,000 from the defendant, the printer and publisher of the *Englishman's*

(1) See *Nawab Sidhee Nazir Ali Khan v. Ojoodhyaram Khan*, 10 Moo. I. A., 540.

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Saturday Evening Journal, as damages for the publication of a false and malicious libel.

The plaintiff, a member of the Bengal Council, carried on business as a bookseller and publisher in Calcutta, and he was also a shareholder and director of the "Calcutta Central Press Company, Limited." He stated in his plaint that the working of the Company having been unfavorable during the year ending 30th April 1872,

"The plaintiff, towards the close of that year, in good faith, and without any sinister design of profiting himself or his firm at the expense of the Company, proposed, on behalf of himself and his firm, to his co-directors, to guarantee to the shareholders of the Company a profit of at least 5 per cent. *per annum* on the paid-up capital of the Company, for the period of one year, on condition that he should be made the managing director of the Company for that year."

This proposal was accepted by the directors, and set out in their report for the year. The plaintiff stated that he made it in the belief that the unfavorable working of the Company arose from divided management, and that his experience would enable him, if put in sole charge, to remedy this. (The plaint proceeded as follows :—

"The said defendant, well knowing the premises, and contriving and intending to injure the plaintiff, and to bring him into public scandal and disgrace, and to expose him to public scorn and ridicule, and to cause it to be suspected and believed that the plaintiff was a dishonest person, and had been actuated by sinister and fraudulent motives, in making the aforesaid guarantee on condition of being made the managing director of the Calcutta Central Press Company, and that he had undertaken to act as such managing director from unworthy motives, and by his said proposal had rendered himself a fit subject for contempt and ridicule, falsely and maliciously printed and published in Calcutta, on the 30th day of July 1872 in the aforesaid weekly newspaper, of and concerning the plaintiff, and of and concerning his conduct * * * the following ironical false and malicious libel, that is to say,

'While walking along Wellesley Place, I saw approaching me an ancient-looking man, walking painfully, and, I thought, pensively, with the aid of a hardly less ancient-looking stick. The long lank looks reaching down on either side to a somewhat snuffy coat collar,—

the peculiar air of respectability, combined with pauperism, that marked the old man's gait, could hardly be mistaken. Surely it must—no, it cannot—yes, it is—yet how can it be? The very image but then I never knew him to go without—it is, by Pollux it is, indeed, my old friend Diogenes! But he was without his lantern. There was the familiar placid smile, a little sadder perhaps than was his wont; his eyes were fixed, as usual, on the ground; and, as usual, he was muttering inwardly. He would have passed me had I not grasped his arm!—

'My good Diogenes,' I said, 'I hope no accident has happened to your ——'

'Gone, gone,' he replied, 'gone for ever.'

'What! the lantern?'

'The lantern? Ah! much more than the lantern. Diogenes' occupation's gone, gone for ever.'

'Good heavens,' said I, 'you don't mean to say ——'

'Ah!' said he, 'let me die in peace; I've found an honest man.'

'An honest man,' said I, 'I feel faint;—you look faint—come into the Great Eastern, and let us have——' 'Never more,' said he, 'never more;' and handing me the following paper, which he told me, would explain all, went on towards the river.

It occurred to me afterwards that he might have contemplated suicide: but I was so occupied at the time, partly by surprise at the absence of the lantern, and still more so by the shock his explanation caused me, that, I grieve to say, I neglected to take any measures for his safety. As soon as I had somewhat recovered my breath, I opened the paper he had given me; and here it is for the benefit of your readers."

Then followed the report of the directors of the Calcutta Central Press Company, already referred to, announcing their acceptance of the plaintiff's offer to guarantee 5 per cent., on condition that he was appointed managing director. After this the article proceeded:—

"To comment upon this would be to paint the lily, to gild refined gold. I would congratulate the citizens of Calcutta, but that I fear their singular good fortune is coupled with the loss of my dear old friend.

In order fully to appreciate the remarkable character of F. F. Wyman's offer, it should be understood that the Company had suffered in the last two years a cash loss of Rs. 4,000, and that during

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the last twelve months, its business had fallen off to the extent of upwards of Rs. 12,000. After this I would suggest that, when he brings in his bill to reform the municipality by the introduction of the elective principle, some member of the Council should propose as an amendment that the entire control of our municipal affairs should be vested in F. F. Wyman."

MACPHERSON, J., rejected the plaint as disclosing no cause of action.

The plaintiff appealed on the following grounds:—

Firstly.—That the article was libellous and did constitute a cause of action.

Secondly.—That the plaint ought to have been admitted, and the defendant called upon to appear and answer to the matter therein alleged:

Mr. Woodroffe for the appellant.—The article is *prima facie* a libel; it is wholly satirical and ironical. The writer evidently means that Diogenes' occupation was not gone; that he had not found an honest man; and that the good fortune of the citizens of Calcutta was no good fortune at all; in fact, that the defendant was dishonest. In *The Queen v. Dr. Browne* (1), which was an action for libel, Holt, C.J., said on motion to arrest judgment: "'Twas shown for cause to arrest judgment that there was no cause to charge the defendant, because he said no ill thing of any person, and all he said was good of them: to which it was answered and resolved by the Court that this was laid to be ironical, and whether 'twas so or not, the jury were judges." See also *Boydell v. Jones* (2). [COUCH, C.J.—If you charge in a plaint, that language is used ironically, do you contend that that constitutes a cause of action, and that the plaint ought not to be rejected?] When the plaint is presented, the duty of the Court is simply to see whether, on the face of it, supposing what it alleges is true, it discloses an injury. The question whether the words were or were not used in an ironical sense is one for the jury at the trial, or in this Court for the Judge as representing the jury; see *Jenner v. A'Beckett* (3),

(1) Holt, 425.

(2) 4 M. & W., 446.

(3) L. R., 7 Q. B., 11.

where Mellor and Hannen, JJ., expressed the opinion that it was for a jury, and not for the Court, to consider whether the words there charged to be libellous did or did not go beyond the limits of fair criticism. It might happen that on the trial the plaintiff could prove antecedent facts tending to show malice on the defendant's part. [PONTIFEX, J.—Ought not such facts to be set out in the plaint?] That is not necessary under s. 26 of Act VIII of 1859. [Couch, C.J.—In *Howard v. Muhl* (1), the plaint was originally rejected by Arnold, J., but was admitted on appeal. I do not, however, remember the grounds upon which it was admitted, nor does the report give any information on the point: but the words there complained of were clearly libellous. If the allegations had been true, Mr. Howard would have been dismissed from his situation.] In *Lakshmi Ammal v. Tikaram Tova* (2), the Madras High Court said:—“It does not, we think, appear that the subject-matter of the plaint does not constitute a cause of action. Whether there appears to be a cause of action that is likely to succeed is not the question. It is enough, we think, if it appears that the subject-matter alleged raises a fair question of claim or right for trial and determination between the plaintiff and the party made defendant. Where that is the case, the plaintiff is entitled to institute his suit, and to have it regularly proceeded with and fully heard, and a decree pronounced upon the matter in question.” In rejecting this plaint, Macpherson, J., did constitute himself a judge of the probability of the plaintiff's success: all that he should have done was to determine whether the plaint on the face of it disclosed a claim for trial and determination; and see *Fray v. Fray* (3). The writer of the article either meant that the defendant was a knave or a fool. [Couch, C.J.—You must satisfy us that a writer in a newspaper may not fairly comment upon this matter, and question a particular person's ability to prepare the municipal bill. PONTIFEX, J.—There is nothing in the article to imply dishonesty]. The law grants no greater immunity to a writer in a newspaper than to any other individual—*Campbell v. Spottiswoods* (4). The article is

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(1) 1 Bom. H. C. Rep., App., 85.

(3) 17 C. B., N. S., 603.

(2) 1 Mad. H. C. Rep., 240.

(4) 3 B. & S., 769.

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intended to, and well might, convey to the minds of persons who should read it the idea that the defendant is a dishonest man; it is therefore a cause of action—*Barnett v. Allen* (1). [Couch, C.J. —It would not become a libel because people believed it to be one.] If that were the common belief, it might be given in evidence; thus, in the case of a caricature, the remarks of persons as to its likeness to the person caricatured are admissible in evidence. The new Evidence Act (I of 1872) goes further: by s. 32, cl. 3, Illustration n., impressions are relevant facts. I submit that the learned Judge ought in any case to have admitted the plaint, giving leave to the defendant to move to have it taken off the file; the question would then have been argued, as a demurrer would be in England—*Fray v. Fray* (2).

Cur. adv. vult.

The judgment of the Court was delivered by

Couch, C.J.,—This is an appeal from the decision of Macpherson, J., rejecting a plaint in an action brought by the plaintiff F. F. Wyman for a libel which he alleged had been published concerning him in a newspaper called the *Englishman's Saturday Evening Journal*. Some allusion was made by Mr. Woodroffe, who appeared for the appellant, to the plaint having been rejected by the learned Judge without hearing the argument of Counsel. We understand that no application was made to the learned Judge to hear Counsel. If any such application had been made, Counsel would have been heard. We have had the advantage of hearing Counsel with regard to the plaint being admitted, and were able to form our judgment after the matter has been argued. The alleged libel is set out in the plaint, and there are also allegations which show that F. F. Wyman is a gentleman filling a public capacity, and that the facts which are commented on in the newspaper are true. The question is whether the plaint shows a cause of action. Now, in an action for libel, it is a question for the Court whether the words which are complained of constitute a ground

(1) 3 H. & N., 376.

(2) 17 C. B., N. S., 603.

of action ; and for that reason the words alleged to be libellous are required to be set out in the declaration or plaint. That is the law in the Courts in England, and the same law must prevail here, although the procedure is somewhat different. The Judges in the case of *Wright v. Clements* (1) clearly state this. Lord Tenderden says :—" In actions for libel, the law requires the very words of the libel to be set out in the declaration, in order that the Court may judge whether they constitute a ground of action ; and unless a plaintiff professes so to set them out, he does not comply with the rules of pleading." And Holroyd, J., says :—" Where a charge, either civil or criminal, is brought against a defendant arising out of the publication of a written instrument, as is the case in forgery or libel, the invariable rule is that the instrument itself must be set out in the declaration or indictment ; and the reason of that is that the defendant may have an opportunity, if he pleases, of admitting all the facts charged, and of having the judgment of the Court whether the facts stated amount to a cause of action, or a crime. For it is clear that, when it can be shown distinctly what the instrument is upon which the whole charge depends, that instrument must be shown to the Court, in order that they may form their judgment. A defendant is not bound to put the question as a combined matter of law and fact to the jury, but has a right to put it as a mere question of law to the Court." Another English case in which this rule is recognized is *Blagg v. Sturt* (2). That is an answer to the argument of Mr. Woodroffe that at all events this question must be submitted to a Judge of this Court acting both as judge and jury, and ought not to be determined on the question whether the plaint should be admitted. If the words which are set out in the plaint or declaration are not a libel, the plaintiff cannot by alleging, as he has done in the present plaint, "that the defendant printed and published them, intending to injure the plaintiff and to bring him into public scandal and disgrace, and to expose him to public scorn and ridicule, and to cause it to be suspected and believed that the plaintiff was a dishonest person, and had been actuated by sinister and fraudulent motives," make them one ; nor can the

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(1) 3 B. & A., 506.

(2) 10 Q. B., 899.

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plaintiff by alleging that words are spoken ironically make them libellous, if they do not appear to the Court to be so. The rule that the plaintiff cannot thus extend the meaning of words beyond the in natural import is clearly shown by the case of *Wheeler v. Haynes* (1). This Court sitting now in appeal from the decision of Macpherson, J., has to do what Macpherson, J., had to do, to see whether the alleged libellous matter which is set out in the plaint is really libellous. If it is not, there is no ground of action, and the plaint ought not to be admitted. In determining whether the word "honest" is used ironically, and it is meant that the plaintiff was dishonest, we must look at the whole article. We must look at the context, as well as the words which are said to be ironical. Looking at the whole article, it appears to me that the first part about Diogenes cannot be understood to mean that F. F. Wyman was a dishonest man. I do not think it can at all fairly be understood to bear that meaning; and with regard to the latter part of the article, where the writer says:—"In order fully to appreciate the remarkable character of F. F. Wyman's offer, it should be understood that the Company has suffered in the last two years a cash loss of Rs. 4,000, and that during the last twelve months its business had fallen off to the extent of upwards of Rs. 12,000. After this I would suggest that, when he brings in his bill to reform the Municipality by the introduction of the elective principal some member of the Council should propose as an amendment that the entire control of our municipal affairs should be vested in F.F. Wyman:" that is nothing more than a comment which the writer might fairly make on the facts which he had stated. I can see nothing in this article which goes beyond a fair comment on the acts of F. F. Wyman as a publicman, and the first part about Diogenes is merely an attempt by the writer to make a little fun at the expense of F. F. Wyman. I cannot look upon this as a libellous article. I think that the decision of Macpherson, J., was right. The appeal must be dismissed.

Appeal dismissed.

Attorney for the appellant: Mr. Oliver.

APPELLATE CIVIL.

Before Mr. Justice Kemp, Mr. Justice Macpherson, and Mr. Justice Ainslie.

IN THE MATTER OF THE PETITION OF HURIS CHUNDER MITTER.*

1872
June 25.

Moonsiff, Dismissal of—High Court—English Committee—Jurisdiction.

A Moonsiff having been dismissed by an order of the English Committee, consisting of four Judges of the High Court, applied to a Division Bench, consisting of the Chief Justice and Mitter, J., to re-consider his case. The Chief Justice having dismissed his application, while Mitter, J., considered that he was entitled to a re-hearing, he appealed under cl. 15 of the Letters Patent. The Court considered it unnecessary to enter into the merits of the questions raised, and held that the Moonsiff having been removed by an order of four Judges forming the English Committee, no Division Bench had any power to re-consider, or review, or set aside, or to order the Judges of the English Committee to re-consider, review, or set aside the decision of the English Committee.

THE facts of this case were as follows :—

Baboo Huris Chunder Mitter, Moonsiff of Burdwan, was removed from his office by a Resolution of the English Committee, composed of four Judges of the High Court, dated the 15th September 1871. He thereupon presented a petition to a Division Court consisting of Couch, C. J., and Mitter, J., praying that the Court would be pleased to “re-consider and review their said resolution”

Mr. Woodroffe appeared in support of the petition.

The following judgments were delivered, on 1st March 1872, by Couch, C. J., and Mitter, J. :—

Couch, C. J.—Mr. Woodroffe made an application to this Division Court that we should re-consider and review a decision of the English Committee, which was made on the 15th of September 1871, by which the applicant was dismissed from employment for (as Mr. Woodroffe described it) abuse of his judicial position.

* Appeal No. 2 of 1872, under cl. 15 of the Letters Patent of 1865, from an order of Couch, C. J., dated the 1st March 1872.

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The grounds upon which the application was made were similar to those upon which a like application was made to the Court in the case of the Moonsiff of Pollás.

The application of that Moonsiff has been heard by a Court composed of five Judges, and judgment has been given that the application should be refused (1). The reasons which the Court

(1) The resolution of the High Court dated the 27th July 1871, in the case of the Moonsiff of Pollás, and the decision on his application for a review, dated the 29th January 1872, were as follows:—

PRESENT: *Mr. Justice Norman, Officiating Chief Justice, Mr. Justice Loch, Mr. Justice L. S. Jackson, and Mr. Justice E. Jackson.*

Read the following correspondence:—

A letter from the Judge of Dacca, No. 142, dated 16th February last, reporting the result of his personal enquiry into the cause of certain arrears on the file of Baboo Deemonath Mullick, Moonsiff of Pollás as evincing wilful and systematic disobedience on the part of the Moonsiff of the law and the Circular Orders of the High Court.

A letter from the Officiating Registrar, High Court, to the Moonsiff of Pollás, dated 3rd April 1871, No. 1046, suspending that officer and calling upon him to show cause why he should not be removed from his office.

A letter from the Officiating Registrar to the Judge of Dacca, informing him of the foregoing suspension, and intimating that the explanation called for from the Moonsiff should be submitted through him (the Judge).

A letter from the Judge of Dacca, No. 531, dated 21st June 1871, forwarding, with comments, the Moonsiff's explanation and the diary of the Moonsiff's Court.

After full consideration of the foregoing correspondence and papers, the Court proceeds to put on record the conclusions it has arrived at in respect of the Moonsiff, Baboo Deemonath Mullick's conduct, and the action it deems **fit** necessary to take.

It is shown that, instead of taking up

and deciding contested cases when the witnesses are in attendance on the day fixed for hearing, the Moonsiff habitually postpones them. On the day to which the hearing is adjourned, instead of taking the adjourned case immediately after any routine or other business which will not admit of delay, giving it priority over cases in which there has been no adjournment, the Moonsiff habitually takes up small and unimportant cases which go to swell his returns. These postponements are made without any reference to the interest of the suitors, or the duty of a judicial officer as regards witnesses who attend in obedience to a summons.

One case is a sufficient illustration of the delays of such cases in the Court of the Moonsiff of Pollás.

No. 428 was a suit for the possession of land instituted on the 4th of April 1870. After the issues were framed (29th April and 16th May), the 17th of June was fixed for the hearing.

On the 17th of June witnesses attended, but were not heard.

Postponed to 7th of July with a similar result.

Postponed to 9th of July with a like result.

Postponed to 15th of September as before.

Postponed to 28th October. Defendant's witnesses in attendance as before.

Postponed to 17th November. Witnesses attended. Three of plaintiff's witnesses examined.

Postponed to 18th November. Witnesses attended. Three witnesses examined for plaintiff. one for defendant.

Postponed to 19th November. Defend-

gave in that judgment I think are applicable to the present case. I see no distinction between the two cases; and for the

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ant's witnesses attended. Three of defendant's witnesses examined.

Postponed to 8th December. Three of defendant's witnesses, present not heard.

Postponed to 22nd December. Defendant's witnesses not heard.

Postponed to 23rd December. Defendant's witnesses not heard. Witnesses sent away.

Postponed to 31st December. Plaintiff petitioned to make defendant a witness.

Postponed to 12th January 1871. Defendant examined. Local enquiry ordered, and case further adjourned.

In January, on the thirteenth of the days for which the case was fixed, it was discovered that a local enquiry was necessary, a matter which the Moonsiff, if he had taken up the case and paid proper attention to it, would have found out on the 7th or 9th of July.

The Moonsiff professes to give an explanation of the causes of the several adjournments. The postponement on the 17th of June was made by the Moonsiff's predecessor; the 7th of July may therefore be taken as being the first day on which the case stood on the Moonsiff's list as an adjourned case. The Moonsiff writes:—

On the 7th of July 1870 decided one original suit, 7 of 1870; fixed issues in four cases; and examined sixteen witnesses, of whom five were examined in original suit, 954 of 1869.

The Moonsiff's diary shows what was the work which he did on this 7th of July. A copy of the entries on that day shows that in

No. 954 of 1869, three witnesses for plaintiff, and two for defendant, were examined. Postponed because there was no time to decide it.

No. 713. Three witnesses for plaintiff examined. Postponed because there was no time to decide it.

One decree *ex parte*, two witnesses.

No. 785. Two witnesses examined. Postponed.

No. 776. One witness for plaintiff, and two for defendant, examined. Case postponed.

No. 1085. One witness for plaintiff. Case postponed.

Four cases, issues framed.

The 8th was a holiday.

On the 9th the Moonsiff says he disposed of one original suit, four claim cases under s. 246 of Act VIII of 1859, and framed issues in four original cases. Examined eleven witnesses. The diary is as follows:—

One claim admitted on evidence of two witnesses.

One rejected, four witnesses.

One suit decreed *ex parte*.

One claim admitted, two witnesses heard.

One certificate case, two witnesses.

One witness heard for decree-holder in claim case.

Four cases, issues framed *ex parte*.

The Moonsiff, by way of explanation why the claim and other cases were taken up before the adjourned case, says:—"As Saturdays are devoted to the hearing of miscellaneous cases, I disposed of several cases of that kind on that day, including claims to attached property under s. 246 of Act VIII of 1859, and I had no time left on that day to take up the case No. 428."

The Judge notes that this excuse is not warranted by the memorandum book of cases fixed for hearing, which shows suits for hearing in every stage, from the hearing of the plaintiff's witnesses to final decision, to have been fixed for hearing on Saturdays just the same as on other days.

The Judge has gone through the details of work done by the Moonsiff on each of the several days on which the postponements occurred, and the conclusion at which he arrives is that, in four days out of five, the Moonsiff did not

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reasons given in that judgment, which it does not appear to me necessary to repeat now, it having been seen by Mitter, J., I think the application in the present case ought to be refused.

give anything approaching to a fair day's work, and adds that he thinks the diary shows that the Moonsiff systematically put off contested cases, and took up *ex parte* cases to the great injury of the parties in the contested and more important cases. The Judge adds:—"The book shows incontestably that the greater part of every day's work was regularly postponed day by day." He says:—"It is not possible to believe that the great bulk of the postponements were not attributable to the indolence and indifference of the Moonsiff." He points out "the great and unjustifiable inconvenience and expense to which the suitors and witnesses were subject."

In the opinion of the Court these conclusions of the District Judge are fully made out.

One thing is certain that the Moonsiff has habitually neglected the plain duty of taking up, and of hearing out, each case on the day fixed, a rule to which the attention of judicial officers was pointedly called by the Circular Order of the 13th of October 1863, No. 31.

The Circular Order of the 7th of December 1863, No. 30, contains a warning that the Court will not allow the law and orders which require that each case shall be taken up in its appointed time, and then and there tried out, or regularly adjourned for some sufficient cause, to be treated as a dead letter.

The Court warned judicial officers who should disregard the Circular Order of October 1863 that they would render themselves liable to dismissal. The Court pointed out that it was determined to enforce its orders, and expressed its conviction that severe example would be needed. It seems to the Court that the occasion for making that example has come; that Deenonath Mullick, late Moonsiff of Pollás, must no longer retain an office,

the duties of which he is either unable or unwilling to perform. The Court accordingly, in the exercise of the power vested in it by s. 83 Act VI of 1871, is pleased to order that Baboo Deenonath Mullick, Moonsiff of Pollás, in Zillah Dacca, be, and he hereby is, removed from the office of Moonsiff.

Ordered, that one copy of the foregoing order be forwarded to the late Moonsiff, Baboo Deenonath Mullick, for his information, and another copy to the Judge of Dacca for his information and guidance.

Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Loch, Mr. Justice L. S. Jackson, Mr. Justice Macpherson, and Mr. Justice E. Jackson.

IN THE MATTER OF THE PETITION OF DEENONATH MULICK (LATE MOONSIFF OF POLLÁS).

The Judgment of the Court was delivered by

COUCH, C. J.—In this case an application was originally made to myself and Glover, J., by Mr. Woodroffe, on behalf of the Moonsiff of Pollás, who had been removed from his office by an order of the Judges of this Court who form the English Committee. Considering that it raised a question of much importance, I thought it desirable that the application should be heard by myself and the other Judges of the Committee who were acquainted with the manner in which the case had been disposed of.

Mr. Woodroffe contended that, as the Court now derives its powers from Act VI of 1871, the Bengal Civil Courts' Act, removal or suspension of a Moonsiff under s. 83 of that Act must be either a judicial proceeding, and be ordered by one of the Division Courts sitting in the usual way; or, if it is to be considered an executive rather than a

MITTER, J.—The petitioner in this case was the Moonsiff of Burdwan, and was removed from his office by an order passed by judicial act, it must be the act of the whole Court; and inasmuch as the Moonsiff in this case had not been so removed, his case ought to be re-heard.

S. 33 of the Bengal Civil Court's Act, 1871, provides that the High Court may appoint a commission for enquiring into the alleged misconduct of any Moonsiff, and on receiving the report of the result of the enquiry may, if it thinks fit, remove him from office, or suspend him, or reduce him to a lower grade. The High Court may also, under the same section, without appointing any Commission, remove or suspend any Moonsiff, or reduce him to a lower grade. The section, it appears to me, includes two classes of cases: one, where the Moonsiff is charged with misconduct, and it is proper that there should be a formal and public enquiry into the truth of the charge; the other, where, from general misconduct, or neglect of duty or incapacity, it may be necessary to remove or suspend him, or reduce him to a lower grade. In the former cases there will be a regular judicial enquiry, the provisions of Act XXXVII of 1850 being made applicable: but the High Court is not, we think, bound, on receiving the report, to make any further enquiry, or to allow the Moonsiff to be heard by way of appeal against the report. The Court may, if it is satisfied with the report, at once remove or suspend, or reduce him to a lower grade. The act of the Court may be considered a judicial one, as the Court determines whether there is just cause for the removal or suspension; but it by no means follows from this that the Court is to adopt all the forms of a judicial enquiry. And it appears to us that by this Act the Court has vested in it the powers which the Government had, and which were reserved to it by s. 25 of Act XXXVII of 1850, and the Moonsiff being removable at plea-

sure, the Court may remove or suspend him upon making such enquiry, and giving him such an opportunity of being heard as it may think fit. We think a Moonsiff ought not to be removed or suspended as a punishment, or reduced to a lower grade, without having had an opportunity of being heard: but the mode of hearing is in the discretion of the Court, and it is not bound to adopt any particular mode. The rule that a person cannot be removed from an office, without having an opportunity of being heard, was affirmed by the House of Lords in *The Queen v. Saddler's Company* (a), and although in the case of an officer removable at pleasure, a removal without it might be valid, we think this Court ought to adopt the rule when it exercises the powers conferred upon it by this Act.

Mr. Woodroffe contended that the removal or suspension of a Moonsiff under the Act is a judicial proceeding, and must be had in open Court before a Division Court, with the forms of a judicial enquiry, as in the case of the suspension of an attorney by the Court on its original side; or, if not, as the duty is to be performed by the Court, it must be the act of the whole of the Judges.

S. 13 of 24 & 25 Vict., c. 104 (the High Courts' Act), provides "subject to any laws or regulations which may be made by the Governor-General in Council, the High Court established in any presidency under this Act may, by its own rules, provide for the exercise, by one or more Judges, or by Division Courts constituted by two or more Judges of the said High Court, of the original and appellate jurisdiction vested in such Court, in such manner as may appear to such Court to be convenient for the due administration of justice."

(a) 10 H. L. Ca., 404.

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the Judges of the English Committee of this Court on the 15th of September 1871. He now applies to us for a re-consideration of his case, urging, among other grounds, that the Judges of the English Committee had no authority to pass the order above referred to, and that the said order is otherwise invalid, inasmuch as it was made without hearing him through his Counsel, notwithstanding that he had asked for leave to be so heard. I am of opinion that this contention is valid, and the petitioner is entitled to a re-hearing.

In accordance with the opinion of the Chief Justice, the application was dismissed; and the petitioner preferred this appeal under the Letters Patent, 1865, cl. 15.

Now it cannot have been the intention of the Legislature that, whilst judicial duties of the gravest importance, either civil or criminal, may be performed by one Judge, or a Division Court composed of two Judges, the other duties of the Court, many of them being of little importance, and some purely ministerial, are to be performed by all the Judges. It would be, we might almost say, absurd to suppose this. The section must not be construed strictly, but liberally and comprehensively: and we think the meaning of the Legislature cannot be carried into complete effect except by construing jurisdiction to include the exercise by the Court of all powers, either of an original or appellate nature, which are conferred upon it. And for the same reason, the word 'jurisdiction' in the 36th clause of the Charter should receive the same construction. We may refer to s. 15 as containing powers which it could not have been intended that all the Judges must concur in exercising.

Since the passing of the Bengal Civil Courts' Act, no formal rule has been made as to the exercise by the Court of the powers contained in it, but as a rule the powers have been exercised in some cases by the Judge in charge of the English Department, and in others by

the Judges composing the English Committee according to the nature of the case, in the same manner as similar powers were exercised by the Court before the passing of the Act. The case of the present applicant has been disposed of in the same manner as it would have been if a formal rule had been made. It has been determined on its merits by the same Judges, and I do not consider that the absence of a formal rule furnishes a ground for a re-hearing of the case.

The application is therefore rejected.

JACKSON, J.—The judgment just delivered is the judgment of us all: and I wish only to add the following statement:—

It appears that, since the passing of Act XVI of 1868, and of Act VI of 1871 the case of four Moonsiffs have been inquired into with the result of their dismissal from office; and in each case the matter was decided by the Judges composing what is called the English Committee. In the case of Baboo Deenonath Mullick, the present petitioner (as also in the other cases), the fullest opportunity was given to him of making his defence and justification, and that defence and justification were most fully considered.

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Baboo Amarendernath Chatterjee for the Moonsiff. [MACPHERSON, J.—What is the nature of this proceeding? Suppose we make an order, how is it to be carried out? Your application to the Division Bench was a review, and the senior Judge made an order rejecting it. There is no appeal.] If your Lordships think that the English Committee are wrong, and that the Moonsiff was entitled to be heard, he might make a substantive application to be restored to his post. There is nothing in the law to enable the Judges of this Court to form an English Committee, and to give the Committee the power to do certain acts. Suppose a Commissioner took it upon himself to dismiss a Moonsiff? [MACPHERSON, J.—But this was done by the High Court.] It was done by the English Committee who are entrusted with powers to do certain ministerial acts. They cannot act as a Court. The proper way here would have been to appoint a commission to enquire into the alleged misconduct of the Moonsiff under the provisions of Act VI of 1871. The words of cl. 15 of the Letters Patent of 1865 are large enough to include this case. The application to the Division Bench was a substantive application, on the ground that the English Committee had no jurisdiction. It is true that the word “review” is used in the petition, but it must be received in the sense merely of a re-consideration of the matter. It is not just to restrict its meaning to the technical and legal sense; A “review” is a re-hearing only by the same Judges who tried the case. The application was to a Division Bench of the High Court; not to the English Committee. It is a hardship on the petitioner that he should be dismissed by the gentlemen of the English Committee not as Judges, and without a hearing, instead of the proper course which is pointed out by the law being adopted.

The judgment of the Court was delivered by

MACPHERSON, J. (who, after stating the facts, continued.)—Putting on one side the question whether the decision of the Chief Justice in this matter is a judgment within the meaning of cl. 15 from which any appeal lies, it appears to us

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that there is another and fatal preliminary objection to the whole application of the petitioner, which renders the proceedings he has taken wholly bad, and makes it unnecessary for us to enter now into the merits of the questions he desires to raise before us.

Having been removed from his office by a resolution or order of four Judges of the Court (the English Committee), the petitioner has applied to a Division Bench, consisting of two other Judges of the Court, praying the Court to review and re-consider the resolution which removed him. But it is quite clear that no Division Bench has any power to re-consider, or review, or set aside a decision of the English Committee, or to order the Judges of the English Committee to re-consider, or review, or set aside their decision; and that no order which the first Bench could have made, or which we now can make, could by any possibility restore the appellant, or render it incumbent on the English Committee to review their proceedings. That being so, the petitioner's application is wrongly conceived, and must be wholly infructuous. We therefore decline to enter into the merits of his case.

It is said that the Chief Justice, by hearing the petitioner showed that he considered the application was one which the petitioner was entitled to make. But if the circumstances under which the application was heard are borne in mind, it will be seen that no such inference can fairly be drawn from the fact of the petitioner having been heard. Before expressing any opinion on the case of Baboo Huris Chunder Mitter, the Chief Justice, in the matter of the Moonsiff of Pollás, in order that the question of the regularity, or otherwise, of the proceedings of the English Committee might be finally determined, referred the application to a Court of five Judges, consisting of himself and the four surviving members of the English Committee by whom the Moonsiff of Pollás had been dismissed. That Bench, being composed of the members of the English Committee, whose decision was objected to, could and would, of course, have reviewed their decision if they had thought any injustice had been done.

The Chief Justice, considering (as is usually considered by the Judges of this Court) that the unanimous decision of a

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Bench of five Judges must be taken as conclusive on the questions disposed of by it, and considering (as is the fact) that the application of the present petitioner was clearly governed by the decision of the five Judges in the Pollás Moonsiff's case, simply decided that, for the reasons given in the Pollás Moonsiff's case, the application must be dismissed. It never became necessary or the Chief Justice to consider what order in particular the Division Court, of which he was a member, could make which would benefit the appellant. There is nothing, therefore, in the mere fact of his having heard the petitioner before he dismissed the application which in any degree shows that the Chief Justice meant, either directly or indirectly, to decide that a Division Bench could make any order setting aside or altering a decision of the English Committee, or could compel the English Committee to review their proceedings.

It is urged that we ought not to deal with this matter strictly, or to treat it as if it were supposed to be technically an application for review of judgment, such as may be made under the Civil Procedure Code. But whether we look at the case strictly or otherwise, we find that the petitioner's object is always one and the same—to obtain a re-hearing of his case, and a re-consideration of those matters which have already been considered by the English Committee of four Judges, who, having considered them carefully and fully, ordered the petitioner to be removed from office. Whether the procedure of the English Committee and their final order were legal and valid, or otherwise, there the order is: and there is nothing in the Charter which authorizes us, or any other Division Court, to review, or re-consider it, or to set it aside.

Supposing we were to say that the appellant should have been dealt with in a manner differing from that in which he was dealt with, in what respect would he be benefited? His position would be exactly what it is now, and he would be no nearer restoration than he is at present.

The petitioner's application being entirely wrongly conceived and inofficious, we dismiss this appeal.

Appeal dismissed.

[PRIVY COUNCIL.]

P. C.,
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Nov. 21, 22;
Dec. 3.

In re THOMAS NEWTON (APPELLANT).

[On appeal from the High Court of Judicature' North-Western
Provinces, Alahabad.]

Barrister—Suspension—Malus Animus.

An order of a High Court suspending a barrister from practice for five years set aside on the ground that, although there had been grave irregularity, there was no *malus animus* to show an intention to commit a fraudulent act.

THIS was an appeal against two orders of the High Court; the first being a rule calling on the appellant to show cause why he should not be suspended from practice, the other making an order for his suspension for five years.

The facts of the case fully appear in the judgment of the Judicial Committee.

Sir *B. Palmer*, Q.C., and Mr. *Bush Cooper*, appeared for the appellant, and contended that the Judges, not having been put in motion by any one applying to the Court, but being themselves the prosecutors, the proceedings were illegal; that no complaint had been made by the party alleged to have been wronged, and that the alleged misconduct was an error arising from a misconception of the law applicable to Mrs. Saunders' case. They cited *Emerson v. The Judges of Newfoundland* (1).

Mr. *Shapter*, Q.C., on behalf of the Judges, submitted that no appeal would lie, and referred to the Letters Patent of 17th March 1866, s. 30. He also referred to *Lechmes Charlton's* case (2), *Ex parte Bayley* (3), and *Martin's* case (4).

Their LORDSHIPS gave the following Judgment:—

This appeal is brought by Mr. Thomas Newton, a barrister-at-law and an advocate of the High Court of Judicature for the

* *Present* :—THE RIGHT HON'BLE SIR JAMES W. COLVILLE, SIR JOSEPH NAPIER, SIR MONTAGUE SMITH, AND SIR LAWRENCE PEEL.

(1) 8 Moo. P. C., 157.

(3) 9 B. & C., 691.

(2) 2 Myl. & Cr., 316.

(4) 2 Russ. & Myl., 674.

North-Western Provinces, against two orders of that Court dated, respectively, the 13th and the 27th of August 1870.

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The particular terms of these orders will be afterwards considered. It is sufficient for the present to state that they were made in the exercise of the power vested in the Court by the 8th clause of the Letters Patent constituting it; and that, by the latest of them, Mr. Newton was suspended from practising as an advocate of the Court until the further order of the Court. Liberty was at the same time given to him, at the expiration of five years from the date of the order, to apply for permission to resume practice, which, on the production of satisfactory proof of good conduct in the meantime (it was said), would be conceded to him. The effect, therefore, of the order was to suspend Mr. Newton from practising as an advocate of the Court, certainly for five years, and possibly for a longer and indefinite period.

The following are the proceedings which resulted in this suspension:—

On the 19th of July 1870, Mr. Bramly, the Officiating Judge of Allyghur, forwarded to the High Court a report of the proceedings in his Court on an application made by Mr. Newton, on behalf of one Mrs. Saunders, for letters of administration to the estate of her deceased son, Paterson Tandy Saunders, imputing improper conduct to Mr. Newton in that matter, and submitting to the Court whether such conduct was becoming a barrister. The precise nature of the charges against Mr. Newton will appear from the next proceeding.

On the receipt of this communication, the High Court passed an order, dated the 30th July 1870, calling upon Mr. Newton, on the 10th of August following, to answer the matters stated in Mr. Bramly's letter and report, "whereby it had been brought to the notice of the Court that he, Thomas Newton, had been guilty of grossly improper conduct in that, whilst acting as Counsel for Mrs. Saunders, on application to Mr. Bramly for letters of administration of the estate of her deceased son to be granted to her, he, well knowing the said Mrs. Saunders not to be the administratrix of the deceased Paterson Tandy Saunders' estate, obtained from the said Mrs. Saunders, and endorsed and

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put in circulation a Government loan note for the sum of Rs. 3,000 belonging to the estate of the said Paterson Tandy Saunders, and also certain other Government loan notes, the property of the said estate, the said Government notes having been endorsed by Mrs. Saunders as administratrix, although the said Thomas Newton was aware that administration of the estate and effects of the said Paterson Tandy Saunders had not been granted to the said Mrs. Saunders; whereby also it had been brought to the notice of the Court that Mr. Thomas Newton had been guilty of grossly improper conduct in the discharge of his professional conduct as an advocate, in having wilfully deceived the said Mr. Bramly in the course of the hearing of the said application for letters of administration, by informing him, on or about the 9th July 1870, that he was greatly surprised to hear that the said Paterson Tandy Saunders was illegitimate, whereas he, the said Thomas Newton, was well aware of the illegitimacy of the said Paterson Tandy Saunders, with some circumstances of aggravation concerning this latter charge, which it is unnecessary to state."

Mr. Newton appeared before the Court under this order, and made a verbal statement in explanation of both charges. Evidence was taken, and a number of letters were produced in the course of the enquiry. On its termination the Court acquitted Mr. Newton of the second charge, but pronounced his explanation in respect of the first to be unsatisfactory, in terms which will be afterwards considered; and having commented on his conduct in respect of various new matters which had come out in the course of the inquiry, and on the perusal of the letters produced, determined to take further proceedings against him. The result was that, on the 13th of August 1870, an order, being the first of those under appeal, was drawn up in the following terms:—

IN THE MATTER OF THOMAS NEWTON, AN ADVOCATE OF THE COURT.

"It appearing to the Court that the above-mentioned Thomas Newton, an advocate thereof, has been guilty of grossly improper conduct in the discharge of his professional duty as an advocate in procuring his client, Catherine Saunders, to endorse as administratrix to Paterson Tandy Saunders' estate three Government promissory notes, of the

aggregate value of Rs. 14,000, or thereabouts, viz., No. 92111 of 1854-55 for Rs. 1,000, No. 92112 of 1856-57 for Rs. 10,000, both bearing interest at 5 per cent., and No. 92113 of 1859-60, for Rs. 3,000, bearing interest at (5½) five and a half per cent., and belonging to the estate of Paterson Tandy Saunders, deceased, he, the said Thomas Newton, well knowing that the said Catherine Saunders was not the administratrix of such said estate, and in endorsing and putting in circulation one of the said notes, to wit, the Government promissory note No. 92113 of 1859-60, for the sum of Rs. 3,000, bearing interest at 5½ per cent.: and also in drafting a certain letter dated on or about the 14th day of April 1870, and in procuring the same to be copied by one Maria Hills, and signed and sent by the said Catherine Saunders to the firm of Gillanders, Arbuthnot and Co., of Calcutta, which said letter contained a statement or introduction in the words following, to wit:—‘With reference to your kind offer to advance money for the coming indigo season,’ which statement or introduction was known to the said Thomas Newton to be false, and inserted, with the intention of inducing the said firm of Gillanders, Arbuthnot and Co., to advance for the manufacture of indigo certain moneys, and with the intention of procuring the said Catherine Saunders to pay to him, the said Thomas Newton, out of the moneys if and when so advanced a sum or sums of money on account of his fees as an advocate: and also in procuring employment as an advocate by means of a threat contained in a certain letter written and sent by the said Thomas Newton to the said Catherine Saunders, and dated on or about the 27th day of January 1870, in the words following, to wit:—‘If I do not appear for you, I fear the result, as I know all the particulars; and recollect, if the answer is not properly put, you may lose all you have.’ and generally in his behaviour and conduct in connection with his employment as an advocate by the said Catherine Saunders at divers times in the months of January, February, March, April, May, June, and July 1870. Now, the said Thomas Newton is hereby ordered to attend at the sitting of this Court, to be held at the Court-house, Allahabad, on Saturday, the 27th day of August instant, at eleven of the clock in the forenoon, to show cause why he, the said Thomas Newton, should not be suspended from the practice of his profession as an advocate of this Court within the jurisdiction of this Court.”

Mr. Newton duly appeared to show cause against this rule: and, on the 27th of August 1870, the Court gave final judg-

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ment. It acquitted Mr. Newton on all but the two first charges, viz., the imputed misconduct in inducing Mrs. Sanders to endorse the Government notes, and the imputed misconduct in causing her to write the letter to Gillanders, Arbuthnot and Co.; and finding that these two charges had been wholly or in part established against him, passed the order of suspension, which the second of those under appeal.

Exception was taken at their Lordships' Bar to this course of procedure. It was argued first that the order of the 30th of July 1870 was objectionable, inasmuch as it prejudged the appellant's case, by assuming that he "had been guilty of grossly improper conduct." Their Lordships, however, are of opinion that, although this order may not have been very happily worded, the true construction of it is that Mr. Newton was thereby merely called upon to answer the matters stated in Mr. Bramly's letter and report; such matters being, for the sake of convenience, reduced into the two formal charges of professional misconduct set forth in the order; and that there was no intention on the part of the Court to prejudge the case, or to prevent Mr. Newton from having the full benefit of any explanation of the matters charged, which he might be able to offer. That this was so, is shown, their Lordships think, by the subsequent proceedings. It was next objected that the Judges improperly placed themselves in the anomalous position of being at once accusers and Judges; and that they ought to have committed the conduct of the proceedings against Mr. Newton to some third person. And in support of this latter proposition, the case of *Emerson v. The Judges of Newfoundland* (1) was cited. In that case, whilst litigation between an attorney and his former client was still in some sort pending, though after payment under protest of the sum claimed, the Court, of its own mere motion, and not on the application of the opposite party, and without previously calling upon the attorney to explain his conduct, served him with a notice to show cause, within four days, why he should not be struck off the rolls; refused to enlarge the rule and give him further time to prepare his

(1) 8 Moo. P. C., 157.

defence ; and, on his failing to show cause within the four days, made the rule absolute. It is obvious that several of the circumstances which induced this Committee to reverse that order do not exist in the present case. It is, however, undoubtedly true that, in delivering their Lordships' judgment, Lord Kingsdown said that an explanation should have been required ; and that, upon that explanation proving insufficient, "the proper course would have been that some person should have been instructed, on behalf of the Crown, to apply to the Court for a rule to show cause why further proceedings should not be taken." Looking to the substance of the objection as applicable to this case, their Lordships think that there is a broad distinction between the charges originally brought by Mr. Bramly and those made for the first time by the order of the 13th of August 1870. The High Courts in India exercise peculiar powers of superintendence and control over the subordinate Courts and the proceedings therein. It was, their Lordships apprehend, in the regular course of practice that Mr. Bramly should make the report, which he did make, of proceedings in his own Court ; and that he should complain, if he had ground of complaint, to the High Court of the supposed *mala praxis* of a practitioner over whom he had no direct power, but who, by virtue of being an advocate on the rolls of the High Court, had the right of appearing in the lower Court ; and their Lordships are of opinion that the High Court was perfectly justified in taking action on that report and complaint by calling upon Mr. Newton to explain his conduct. Whether it would not have acted more regularly if it had placed the conduct of the further proceedings against Mr. Newton in the hands of a third party is another question. But the Judges have stated that they had not the means of doing so, and their Lordships must accept that statement ; and they are disposed to think that, even on the authority of the case cited, the omission to do this is not a fatal objection to the subsequent proceedings. Their Lordships, however, cannot but regret that the learned Judges of the High Court, acting on letters which came to their knowledge in the course of the first inquiry, should have thought fit, on the instant and without further inquiry, to frame new charges against Mr. Newton, and thus assume the functions

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NEWTON. of accuser and Judge. A very strong and clear case may arise in which such a course would be justified ; but the inconvenience of it is great ; and the more manifest in the present case, inasmuch as the learned Judges found themselves obliged, in all but one instance, to abandon the charges which they themselves had on the first impression suggested and framed. Their Lordships have deemed it right to make these observations on the questions of form which have been raised before them. To decide, however, such a case as this upon a question of form would be far from satisfactory, and they therefore proceed to consider it upon its merits.

They are relieved from the necessity of considering any but the two charges upon which Mr. Newton was finally suspended. Of the second of the original charges he was acquitted on the first proceeding against him. Of all but two of the charges embraced in the order of the 13th of August 1870 he was also acquitted, the Court being of opinion that, though the conduct imputed to Mr. Newton by those charges may have been inconsistent with the rules and traditions which regulate the conduct of barristers in this country, and may not have been altogether unobjectionable even in India, it did not amount to that *mala praxis* on which the Court, having regard to the position and functions of an advocate in the North-West Provinces, could fairly found any proceeding of a penal character.

Their Lordships propose to deal first with the last of the two charges which the High Court thought were established against Mr. Newton, viz., that of having counselled Mr. Saunders to write to Messrs. Gillanders, Arbuthnot and Co. the letter of the 14th April 1870.

The facts admitted or proved concerning this letter are as follows :—

Mrs. Saunders was a native woman, who, after cohabiting for several years with Mr. George Saunders, an indigo planter in the Allyghur district, had been married by him some time before his death. The date of this marriage is now ascertained to have been the 17th October 1856. Under the will of her deceased husband she seems to have been tenant for life of his indigo factory and other property. She had several children by him,

born either before or after the marriage. One of them was a son, Paterson Tandy Saunders, who, under his father's will or otherwise, was possessed of several Government notes aggregating Rs. 14,000. Another was a daughter who had been married first to a person of the name of Nichterlein; and afterwards, after having been sued by him for breach of promise of marriage, to a Mr. Kelly. George Saunders had been indebted to Mr. Nichterlein's estate, which was in the hands of the Administrator-General. Mrs. Nichterlein before her second marriage had made a gift of her share of this debt to her mother, or to her father's estate; but this gift was disputed by her second husband; and the original debt, and the effect of Mrs. Nichterlein's gift, appear to have been at the beginning of 1870 subjects of pending or contemplated litigation. Mrs. Saunders had likewise a cross-claim against Nichterlein's estate for the proceeds of indigo of a former season. On the 15th December 1869, Paterson Tandy Saunders died under age and unmarried. Shortly after his death, and on the 10th January 1870, Mr. Newton, who had acted in at least one lawsuit on behalf of Mr. George Saunders, and appears to have kept up friendly relations with the family, wrote to Mrs. Saunders condoling with her on the death of her son, and volunteering, if he were not then retained to act for her in that matter, some advice concerning the litigation between her and the Administrator-General. It further appears that she was then pressed for money, and that she required funds both for the purposes of the indigo factory and for carrying on the suits pending or about to be commenced, and that, in respect to the latter, Mr. Newton was to receive certain fees. In these circumstances, she, under the advice of Mr. Newton, wrote and sent to Messrs. Gillanders, Arbuthnot and Co., merchants of Calcutta, the following letter:—"Coal Factory, Allyghur, 14th April 1870. Dear Sirs,—With reference to your kind offer to advance money for the coming indigo season, I write to inquire whether you would place at my disposal Rs. 30,000. On hearing from you, I will commence my indigo advances." On the first inquiry, that of July 1870, it came out on the evidence of Miss Hills, the governess and amanuensis of Mrs. Saun-

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ders, that if any money had been received from Messrs. Gillanders, Arbuthnot and Co., Mr. Newton's fees would have been paid. Messrs. Gillanders, Arbuthnot and Co., however, declined to make any advance, and nothing came of the application to them. The Judges of the High Court, nevertheless, saw fit to make this transaction matter of charge against Mr. Newton. The view of it which they took when they framed the charge in respect of it, which is contained in the order of the 13th of August 1870, was thus stated by the Acting Chief Justice:—

“Again, you induced an uneducated woman, whom you were advising—whether wisely or unwisely matters not—to carry on certain litigation, whereby you hoped to secure to yourself, what I must call under the circumstances, the exorbitant fee of Rs. 3,800, to write to a calcutta firm a letter drafted by you containing a false assertion, whereby that firm was to be induced to advance to Mrs. Saunders, for the purposes of her indigo factory, certain moneys, and which moneys that firm would naturally consider were to be employed for the legitimate purposes of the factory, whereas a large portion was to be paid to you for the purposes of carrying on litigation. It is abundantly clear that Messrs. Gillanders, Arbuthnot and Co. had never promised to advance moneys to Mrs. Saunders. That Lady, from her manner to-day, we cannot doubt, had never heard their names before. The Court cannot but come to the conclusion that the statement made in the letter to Messrs. Gillanders, Arbuthnot and Co., as to their previous offer of assistance, was to your knowledge false, and that it was made for the purpose of obtaining money to pay your fees.”

When, however, cause was shown against the rule, it came out that Mrs. Saunders, so far from having never heard the names of Messrs. Gillanders, Arbuthnot and Co., had been in correspondence with them at various times between 1866 and 1870, and had had various business transactions with them. It was further urged that the assumption that Messrs. Gillanders, Arbuthnot and Co. had offered to advance money to Mrs. Saunders, if erroneous, had deceived, and could deceive, nobody. And the High Court in its final judgment expressed its willingness to assume “that it was from information given him by Mrs.

Saunders that he (Mr. Newton) introduced the passage relating to a former offer of advances." The gist, therefore, of the offence imputed to Mr. Newton in respect of this transaction is reduced to this, *viz.*, that he, knowing that a portion of the moneys to be received from Messrs. Gillanders, Arbuthnot and Co. was to be employed in payment of his fees, drafted for his client a letter calculated to induce that firm to believe that this advance was sought for a different purpose. It appears to their Lordships, after carefully considering all that is said of this matter in the final judgment of the High Court, that the harsh view of the transaction there taken is not borne out by the facts, and that the drafting of the letter cannot be taken to constitute such a professional misconduct as would justify any part of the severe sentence passed on Mr. Newton. The letter is an application in the most general terms from an indigo planter for an advance of money for the coming season. It is clear that Mrs. Saunders did want moneys for the purposes of her factory. Their Lordships are not aware that such an application implies any undertaking that the money, if advanced, is to be earmarked; is not to be mixed with the general funds of the planter; and that no part of it is to be withdrawn, even temporarily, and applied to a purpose other than the cultivation or manufacture of indigo. If the lender chooses, he can, of course, take any security or guarantee he may think necessary, in order to have the money set apart and applied entirely to the purpose of producing the crop on the security of which he makes the advance; but here the loan was declined. All that is established is that Mrs. Saunders, pressed for money to provide both for carrying on her factory, and for the prosecution of a suit in which she may well have hoped to recover further funds, wrote this letter under Mr. Newton's dictation, meaning to apply part of the money, in the first instance, to the payment of his fees in the suit. Looking to all that is established in respect of this letter, and to the absence of any complaint on the part of any person concerning it, their Lordships are of opinion that the order against Mr. Newton cannot be maintained on this charge.

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They next proceed to consider the graver charge against him of having induced or advised his client to endorse the Govern-

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ment notes as administratrix of Paterson Tandy Saunders, when she was not entitled to assume that character. The facts proved, which particularly relate to this transaction, are as follows :—

On the 5th of April 1870, Mrs. Saunders wrote to Mr. Newton, inclosing one of the notes belonging to the estate of Paterson Tandy Saunders, and standing in his name, being a note for Rs. 10,000, and asking him to get the note renewed in her name, and broken up into ten notes for Rs. 1,000 each. On the 9th of April 1870, Mr. Newton wrote to Mrs. Saunders, to the effect that he had spoken to Mr. Clarke, the treasury officer at Allyghur, who had informed him that the note could not be renewed, nor interest paid upon it, until she had taken out administration to her son's estate. Thereupon, Mr. Newton was instructed to make, and did make, as Counsel for Mrs. Saunders in Mr. Bramly's Court, the application for letters of administration to the estate of her deceased son, describing him as a British subject who had died a minor and intestate. The date of this application was the 2nd of May. On the 6th of May, the day before the usual citations were issued by the Judge, Mr. Newton, who had advanced some small sums to Mrs. Saunders, received from her the security for Rs. 10,000 and two other Government notes standing in Paterson Tandy Saunders' name and part of his estate, all being endorsed by her as administratrix of that estate. At the same time she executed to him a receipt admitting the loan of Rs. 200, and he executed to her a receipt for the notes, being the two receipts; and Miss Hills, in her account of the transaction, has deposed as follows :—“ Mr. Newton wrote the endorsements in pencil on the notes, and told me to write it small on the pencil marks; and I said at the time, ‘ Mrs. Saunders has not got the administratrixship, how can I write that ? ’ and he said, ‘ Whatever blame there is will fall on me. ’ I said nothing more. I then wrote the endorsements. Mrs. Saunders signed them. ” The endorsements were special to Mr. Newton. One of these notes, being one for Rs. 3,000, he afterwards specially indorsed to the Delhi Bank, and that bank having demanded in Calcutta a renewal of it, inquiry was made concerning the fact

of the grant of administration to Mrs. Saunders, and so the transaction was brought to the notice of Mr. Bramly. In the meantime a question had arisen in Mr. Bramly's Court touching the legitimacy of Paterson Tandy Saunders, and whether administration of his estate ought to be granted to Mrs. Saunders as his mother and next of kin, or to the Administrator-General as representing the Crown. It appears to be now certain that Paterson Tandy Saunders was born out of wedlock; but it is suggested on behalf of Mr. Newton that he might nevertheless, as the son of a Scotchman, retaining his domicile, though resident in India, have been made legitimate *per subsequens matrimonium*. Their Lordships think that it is fortunate for Mr. Newton that the determination of this case does not depend upon this point. If it appeared that Mr. Newton, knowing that Paterson Tandy Saunders was born out of wedlock, had applied for letters of administration as if the deceased had been born in wedlock, and, pending that application, had caused Mrs. Saunders to endorse these bills in the character of administratrix when she did not possess that character, and had attempted to raise money on them for Mrs. Saunders, in the expectation that he might ultimately succeed in showing that the *status* of Paterson Tandy Saunders was to be regulated by Scotch law, and that under that law, though born out of wedlock he was legitimate, their Lordships are of opinion that his conduct would have been almost without excuse. For the proof of legitimacy and of the right of Mrs. Saunders to administration, and to a beneficial interest in any part of her son's estate, would in that case have depended on the determination of a disputable, and possibly, very nice question, *viz.*:—Whether Mr. George Saunders, if his domicile of origin were Scotch, had not lost that domicile, and acquired an Indian domicile by settling as an indigo planter in India, and there dying. In the cases of *Campbell v. Campbell* (1) and *Munro v. Munro* (2), one of the principal issues was whether the father of the person whose legitimacy was in question had retained his Scotch domicile. And in both cases the facts on which the issue was determined were very different from those on

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(1) L. R. I., Sc. App., 182.

(2) 7 Cl. & Fir., 842.

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which the like issue would have been tried in the case of Mr. Saunders. But in truth this was not the defence of Mr. Newton in the High Court, nor need it be his defence here. The case which he made there was that when he first made the application for letters of administration, and when he caused Mrs. Saunders to endorse the notes, he did not know or believe that Paterson Tandy Saunders was born out of wedlock, and therefore had good reason to believe that in a few days she would possess the character which the endorsement attributed to her. And this fact has been found in his favor by the High Court. On the occasion of the first hearing, the Acting Chief Justice says :— “When you procured your client to sign the promissory notes as administratrix, you doubtless were under the belief that she would at once get administration granted to her, and we, therefore, do not regard the acts as so gravely criminal as it would otherwise have been. The opinion which we have formed on the second charge, which is made against you in the Judge’s report, that you possibly were not aware that any impediment existed to the obtaining of the administration by your client, enables us to assume in your favor that, when you procured your client’s signature as administratrix, you believed that in a very short time she would be in a position legally to assume that character and make a good title to her son’s property.”

If the High Court had found upon sufficient evidence that Mr. Newton had advised Mrs. Saunders to make the endorsement as administratrix, knowing that she had no title, or a doubtful title, to obtain the grant of letters of administration, their Lordships would have felt that the sentence upon Mr. Newton ought to be confirmed. But the finding of the High Court negatives this knowledge : and upon this finding of the High Court, their Lordships feel that, although, in this matter, Mr. Newton has been guilty of a grave irregularity, which, in their opinion, is well deserving of censure, he has been acquitted of having acted with the *malus animus*, which is a necessary ingredient in every fraudulent act, and therefore that his conduct, though censurable, does not bear the character which the heavy sentence passed upon him would stamp upon it. Their Lordships, therefore, however unwilling to weaken the hands of the Courts of India

in repressing professional misconduct and maintaining a high standard of honor amongst those who are admitted to practise before them, have come to the conclusion that in this case it is their duty humbly to advise Her Majesty to allow the appeal, and to reverse the last of the orders against which it is brought, and in lieu thereof to order that the rule to show cause of the 13th August 1870 be discharged. They do not propose to recommend the reversal of that order, inasmuch as such reversal would imply that no rule to show cause ought to have been made. They make no order or recommendation as to costs.

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BODACAUNT SINGH ROY AND ANOTHER (JUDGMENT-DEBTORS).

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Limitation—Act XIV of 1859, ss. 19, 20 (1)—Execution of Decree—Courts established by Royal Charter—Proceeding to enforce decree.

P. C.*

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Jan. 22, 23 ;
Feb. 3.

Where the High Court passes a decree on appeal from a Mofussil Court, the Court which has to execute the decree of the High Court is governed by the rules which govern the execution of its own decrees.

An appeal prosecuted to a decree is a proceeding to enforce a decree within the meaning of s. 20 of Act XIV of 1859. Also held there was such a proceeding where, on the judgment-debtor seeking to obtain leave from the High Court to appeal to the Privy Council, the execution-creditor intervened.

The ruling in *Chowdhry Wahid Ali v. Mullick Inayat Ali* (2) that whether the decree of the lower Court is reversed, or modified, or affirmed, the decree passed by the Appellate Court is the final decree in the suit, and as such the only decree which is capable of being enforced by execution, not dissented from, except that it was suggested that in all cases it may be expedient expressly to embody in a decree of affirmance so much of the decree below as it is intended to affirm, and thus avoid the necessity of a reference to the superseded decree.

Quere.—Can the ruling in *Anundmayi Dasi v. Purno Chandra Roy* (3) be supported ?

THIS was an appeal from a decision of the High Court at Calcutta, dated the 27th November 1867 (4).

* *Present* :—THE RIGHT, HON'BLE SIR JAMES W. COLVILLE, SIR MONTAGUE SMITH,
SIR R. P. COLLIER, and SIR L. PEEL.

(1) See Act IX of 1871, 2nd Sched., Nos. 166 to 169.

(2) 2 B. L. R., 52.

(3) Case No. 569 of 1865 : 24 August 1866.

(4) 8 W. R., 470.

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The facts were shortly as follows :—

On the 25th March 1862, the appellants obtained a decree in the Zillah Court of Moorshedabad against the respondents for Rs. 9,500.

On 8th June 1863, the High Court on appeal affirmed that decree and ordered the respondents (then appellants) to pay the appellants (then respondents) Rs. 350 as costs, with interest from that date at 12 per cent.

The respondents appealed to Her Majesty in Council.

On the 8th April 1865, a proposal was made by the respondents for a compromise, and a petition was filed praying "for two months' time for carrying on the appeal case," which was in a counter-petition consented to by the now appellants.

Rs. 500 was about the same time paid in respect of the Judgment-debt, but the compromise was not carried out.

On the 9th May 1866, the High Court (Kemp, J.) struck the appeal off for want of prosecution.

On the 22nd April 1867, the now appellants applied to the lower Court for execution of the decree.

The 1st, 4th, 5th, 6th, and 7th columns of the application were filled up as follows :—

Date of Decree.	Whether any Appeal has been preferred after the Decree or not.	Whether any Compromise has been effected after the Decree or not.	The amount of Money due on Bond or as Damages.	The amount of Costs ordered to be paid.
25th March 1862	A regular appeal having been preferred the Zillah decree was affirmed. The judgment-debtor having made an appeal to England against it, and it being pending, the appeal was decided by striking it off from the file on the 20th Nov. 1865 (1).	In the month of April 1865, this compromise was effected with the judgment-debtor: in one item the half of the amount will be paid, and the remainder according to instalments. A petition was made on the 8th April 1865, in the appeal to England, and the proceedings in execution were stayed. In Choitrol 1270 (April 1865) Rs. 500 was paid. but the remainder was not paid according to compromise.	Rs. On account of allowance 9,500 Interest of the period during which it was not paid 1,150 Total, Rs. 10,650 Interest from date of decree up to date 7,590 Total Rs. 18,240	Rs. A. P. Costs of the 1st Court 876-12-6 Interest up to date 525-0-0 Costs of High Court 350-0-0 Interest up to date 199-8-0 Total, Rs. 1,951-4-6

(1) This was a clerical error for 9th May 1866.

Upon this application being made, the Judge stated his opinion that no step had been taken since the 8th June 1863 to keep the decree of the High Court of that date in force, and he refused execution.

Upon this the appellant appealed to the High Court on the following grounds :—1st, that he had three years from the 9th May 1866 within which to execute the decree ; 2nd, that he had three years from the 8th April 1865 ; 3rd, that as the decree was one of the High Court at any rate as to the costs, the period of limitation was twelve years.

The High Court (L. S. Jackson and Hobhouse, JJ.,) held that, so far as the costs of the High Court were concerned, the period of limitation was twelve years, but that as to his decree otherwise, the time for execution expired within three years from the 8th June 1863.

Against this order the appellants appealed to England.

Mr. J. D. Bell and Mr. Cutler for the appellants.—The time of limitation begins to run from the final decree, *Hurree Bungsho Banerjee v. Ramessur Banerjee* (1), *Bipro Doss Gossain v. Chunder Seekur Bhuttacharjee* (2) ; and the reason is this, after a decree is confirmed by the High Court on appeal, the lower Court cannot alter it, and it therefore ceases to be a decree of the lower Court, and the time must run from what has then become the decree—*Onraet v. Sankar Dutt Sing* (3) and *Bápuráo Krishna v. Mádharaó Rámraó* (4). The decree on appeal becomes a new decree, see Act VIII of 1859, s. 361. The decree of the High Court is that of a Court established by Royal Charter. By 24 & 25 Vic., c. 104, the old Courts were abolished, and the High Courts were established under Charter ; there was no provision in the statute to prevent the twelve years' limitation applying to that Court in its appellate jurisdiction. The decree having become that of the High Court, the twelve years' limitation will apply—*Chowdhry Wahid Ali v. Mullick Inayet Ali* (5) and *Bápuráo Krishna v. Mádharaó Rámraó* (4). The Madras Court

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(1) 6 W. R., Mis., 38

(2) Nos. 583 of 1866.

(3) 5 B. L. R., App., 60.

(4) 5 Bom. H. C. Rep., A. C., 214.

(5) 6 B. L. R., 52.

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has come to a different conclusion in a case decided there on 4th March 1870—*Arunachellathudayan v. Veludayan* (1), but it is submitted that the decision of the other Courts is correct. But if the period be not twelve years, and the appellants have only three years from the 8th June 1863 unless steps have been taken to keep the decree in force, the filing of the petition on 8th April 1865 was enough to keep the decree alive. The High Court could not have had the decision of the Full Bench in *Bipro Doss Gossain v. Chunder Seekur Bhuttacharjee* (2) before it; if so, they have decided contrary to it. That decision was approved of in *Bhubaneswari Debi v. Mahendra Nath Chowdhry* (3). Even a notice of an intention to execute would be enough, and the principle simply is whether there has been a *bonâ fide* intention to execute, *Maharaja Dhiraj Singh v. Degun Singh* (5), which was approved of by the Privy Council in *Maharaja Dhiraj Mahtab Chand Bahadur v. Bulram Sing Baboo* (6).

Sir R. Palmer, Q. C., and Mr. Doyne for the respondents.—The words of the Limitation Act cannot be extended so as to bring the High Court in its appellate jurisdiction from Courts not established by Royal Charter within the rule allowing twelve years. The appellant himself in his application for execution rightly describes the decree as that of the first Court, and Act VIII of 1859, s. 212, when read together with ss. 361, 362, shows that the decree, when unaltered, is still the decree of the first Court. [Sir R. COLLIER.—Then, if the High Court gives additional relief, are there two decrees, and must he apply for execution of both?] Yes, and the Chief Justice in the case of *Bipro Doss Gossain v. Chunder Seekur Bhuttacharjee* (1), referred to on the other side, draws a distinction where there is a new judgment. [Sir M. SMITH.—On what ground then does the time run from the date of the High Court decree?] Because the appeal proceedings are keeping the original decree in

(1) 5 Mad. H. C. Rep., 215,

(2) No. 583 of 1866.

(3) 3 B. L. R., App., 33.

(4) 6 B. L. R., App., 146.

(5) 6 W. R., Mis., 98.

(6) 5 B. L. R., 611.

force under s. 20 of Act XIV of 1859. If a decree in the Court of Chancery is appealed to the House of Lords and affirmed, it is still the decree of this Court of Chancery. The effect of making the twelve years' law apply would be to depart from the intention of the Legislature; the Act in question was passed when there were totally different Courts. [Sir J. COLVILLE.—By the Charter the original side retains the law of the Supreme Court, and the appellate side that of the Court from which the appeal came; and if Act XIV of 1859 had not passed, the Statutes of Limitation would apply to the original side, and the regulation law to the appellate side from the Mofussil.] It was merely abolishing the names, but the new tribunals followed the law of the old ones. S. 19 of Act XIV of 1859 shows what proceeding is referred to in s. 20. There must be an active proceeding and an actual *litis contestatio*. There is nothing to show the appeal was actually being contested, and the object of the Act was to ensure due diligence. The Madras case that has been referred to on the other side appears to be more correct than the decision in Bombay and Calcutta.

Their LORDSHIPS delivered the following judgment:—

This appeal, though the facts of it lie in an extremely narrow compass, has raised several questions of general importance and considerable difficulty.

The appellants, on the 25th of March 1862, obtained a judgment against the respondents for the sum of Rs. 9,500, with interest from the date of the plaint, and costs of suit, on a claim founded on an agreement to pay to the appellant, Kistokinker, an allowance of Rs. 900 *per annum* by way of maintenance.

The respondent, Raja Burrodacaunt, appealed against this decree to the High Court of Calcutta; but by the decree of that Court made on the 8th of June 1863, it was ordered and decreed that the decree of the lower Court should be, and the same was thereby affirmed; and that the defendant appellant should pay to the plaintiffs respondents the sum of Rs. 350, being the costs of the appeal, with interest thereon at the rate of 12 per centum *per annum* from the date of the decree to the date of realization.

A petition of appeal to Her Majesty in Council against the

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decree was then presented by the Rajah. He tendered security for costs, and the usual reference was made to ascertain its sufficiency. But the security was never perfected. On the 8th of April 1865, he presented a petition to the Court, suggesting that negotiations for a compromise between him and the appellants were pending, and praying that proceedings in regard to the appeal to England might be stayed for two months. On the same day the appellants filed a petition consenting to that application, and praying that the two months should be granted. The Court, on the 4th August 1865, made an order "postponing the case for two months, as there were hopes of the parties coming to an amicable settlement." The two months expired on the 6th of October, and nothing came of the negotiations, and on the 9th of May 1866, the High Court struck the appeal off the file in default prosecution.

On the 22nd of April 1867, the appellants made their first application to the Zillah Court for execution against the respondents. Their application was in the tabular form, prescribed by s. 212 of the Code of Procedure, which requires the date of the decree of which execution is sought to be mentioned with other particulars. The only decree so specified was the decree of the 25th of March 1862. But the fact of its affirmation on appeal was stated in the next column, and the amount sought to be levied included the Rs. 350 decreed by the High Court as the costs of the appeal. On the 27th of April 1867, the Zillah Judge rejected the application for execution, on the ground that it was barred by s. 20 of Act XIV of 1859, no step having been taken since the 8th of June 1863 to keep the decree in force within the meaning of that section.

The appellants appealed from that decision to the High Court, which, on the 27th of November 1867, ruled that, in so far as the appellants sought to realize the amount decreed to them by the original decree, their application for execution fell within the three years' limitation of the 20th section; but that, inasmuch as their claim for the costs of the appeal, being Rs. 350, rested on the decree of the High Court, and that was a Court established by Royal Charter, they were entitled, under the 19th section of the Limitation Act, to sue out execution for that

amount at any time within twelve years from the date of that decree; and the case was sent back to the Zillah Court with instructions to deal with it accordingly. The appellants have brought this appeal against so much of this order as held that their right to execution for any part of their demand was barred, but there has been no cross-appeal against that part of the order which was in their favor.

The argument on this appeal has raised the following questions:—

1st—Is the execution of a decree of the High Court made on appeal from one of the Courts in the Mofussil to be governed by the 20th or by the 19th section of Act XIV of 1859; or, in other words, is it subject to the three years', or to the twelve years', rule of limitation?

2ndly.—What is the effect of a decree of the High Court affirming a decree of a Zillah Court? Is it to be taken to incorporate the latter in itself, so that, for the purposes of execution, the decree to be executed is to be taken to be a decree of the High Court?

3rdly.—If, on any ground, the decree to be executed in this case is to be deemed subject to the three years' limitation, had anything sufficient to keep it in force within the meaning of the 20th section been done within three years of the date of the application for execution?

Upon the two first and general questions, there have been conflicting decisions by the High Courts in India. The order under appeal appears to have been the earliest which decided that decrees of the High Court were within the 19th section. It has been followed at least in the case of *Chowdhry Wahid Ali v. Mullick Inayet Ali* (1) in Bengal, decided as lately as the 6th of September 1870, and it has been recognized as sound law by the High Court of Bombay in the case of *Bápuráo Krishna v. Mádharáo Rámrao* (2). But in two cases decided by the High Court of Madras on the 4th of March 1870 (3), it was ruled by Scotland, C.J. and Bittleston, J. (apparently without any dis-

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(1) 6 B. L. R., 52.

(2) 5 Bom. H. B. Rep., A. C., 214.

(3) *Arunchellathudayan v. Veludayan*,

and *A. P. Kunhi Perechan Kidavu v. Chembakat Kasava Paniker*, Mad. H. C. Rep.,

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sent on that point on the part of the other Judges composing the Full Bench of the Court) that a decree of the High Court made on appeal from a Mofussil Court is not a decree of a Court established by Royal Charter, within the meaning of the 19th section of the Limitation Act, and is a decree subject to the provisions of the 20th section of that Act. It may be observed that neither in these Madras cases, nor in that decided at Bombay, was the determination of this question essential to the decision of the Court upon the particular appeal before it, since in none of them had the period of three years' limitation, if calculated from the date of the decree of the Appellate Court, expired. This ruling, however, of Scotland, C.J., appears to have led to a re-consideration of the question by the High Court of Bengal.

Their Lordships find that in a case, not cited at the Bar during the argument, which is to be found among the Full Bench Rulings of the High Court of Bengal under date the 12th of June 1871, *Ram Charan Bysak v. Lakhi Kant Bannik* (1), a Division Bench of the High Court referred for the determination of the Full Bench two questions in the following terms:—1st, whether a decree of the District Court affirmed on appeal by the High Court becomes a decree of the last-mentioned Court; and, 2ndly, whether execution of that decree of affirmance passed by the High Court is to be governed by the provisions of s. 19 of the Statute of Limitation, Act XIV of 1859, or of s. 20 of that enactment, *i. e.*, whether the rule of three years or of twelve will apply. The Full Bench, consisting of the late Norman, J. (then acting as Chief Justice), and Looh, Bayley, Macpherson, and Mitter, JJ. unanimously decided the first of these questions in the affirmative; and ruled on the second that when, under s. 361 of the Code of Procedure, a decree of the High Court on its appellate side is transmitted to the District Court, which passed the first decree in the suit for execution, it will have the effect of a decree of such Court, and must be executed within the period limited by the 20th section of Act XIV of 1859. The preponderance, there-

(1) 7 B. L. R., 794.

fore of authority in India is now in favor of the proposition that the execution of decrees of the High Court made on appeal from the District Courts is subject to the three years' rule of limitation. Their Lordships are of opinion that this conclusion is correct.

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The object of Act XIV of 1859 was to carry out a recommendation made many years before by the Law Commissioners for India, by passing one general law of limitation applicable to all Courts in India. It is hardly necessary to remark that the Legislature, in framing the Act, had then to deal with two distinct judicial systems : the one consisting of what had been the Courts of the East India Company and may here be called the Mofussil Courts ; the other the Courts established in the presidency towns and elsewhere by Royal Charter, and administering to all within their jurisdiction, subject to certain statutory exceptions and modifications, the law of England. The law of limitation which governed the former was to be found in the Regulations which had no force within the Presidency towns ; whilst the law of limitation which governed the latter consisted of the statute of James, together with such other portions of the statute law of England applicable to the subject (if any) as had been introduced into India, and the general rules touching the effect to be given to lapse of time which depend on the decisions of the Courts in England. It is not surprising that, in framing a law designed to be common to both systems of judicature, it was deemed necessary to make certain exceptions to the general rule of uniformity. And it may be presumed that, in dealing with this matter of execution, the Legislature was moved by certain reasons, which approved themselves to the minds of those who were conversant with the administration of justice in the Mofussil, to subject the execution of the decrees of the Mofussil Courts, whether of appellate or of original jurisdiction, to the three years' limitation ; whilst, on the other hand, being pressed by the weight and value which the law of England gives to a judgment or decree of a superior Court, it determined not to reduce the period for enforcing the decrees of the Supreme Courts to less than twelve years. Hence the distinction made by the 19th and 20th sections of the Act, in

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which the term " Courts established by Royal Charter " was obviously used, not by reason of anything inherent in every Court established by Royal Charter, but simply because it was thought to define (whether happily or not, it is needless to inquire) certain existing Courts, *viz.*, the Supreme Courts in the three presidency towns and the Recorders' Courts in the Straits Settlements, and possibly to include other Courts of similar constitution and functions which might thereafter be established. The same term, it may be observed, is to be found in the preamble of Act VIII of 1859 (the Code of Procedure) which, when first passed, was not intended to have operation in the Supreme Courts.

That being so, we have to consider how the question is affected by the subsequent amalgamation of the two systems of judicature, and the establishment of the High Courts by Letters Patent under the powers given by the 24 & 25 Vic., c. 104, and the 28 Vic., c. 15. It will be convenient to speak only of the High Court of Bengal. The general scheme of the amalgamation was to constitute one general Court, of which the Judges sitting in various Divisional Courts were to exercise the functions both of the Supreme Court, and the appellate Mofussil Courts (the Sudder Dewanny Adawlut and the Sudder Nizamut Adawlut), all of which were abolished. The powers and jurisdiction of the Supreme Court, with some slight modification of the latter, were transferred to the High Court, to be exercised by it as a Court of original jurisdiction ; and the powers and jurisdiction of the Appellate Mofussil Courts were transferred to it, to be exercised by it as an Appellate Court. But the law to be administered by it as a Court of original jurisdiction was substantially that previously administered by the Supreme Court ; whilst that to be administered by it on appeal from the Mofussil Courts was necessarily that of those Courts. The Code of Procedure (Act VIII of 1859) was indeed made the Procedure of the Court in its original as well as in its appellate jurisdiction, and superseded the procedure which had previously obtained in the Supreme Court. But that Code did not touch the subject of limitation, which continued to be regulated by Act XIV of 1859.

So far, therefore, there can be no ground for inferring that there was any intention on the part either of Parliament or of the Crown to alter the period within which a decree made on appeal from a Mofussil Court could be executed. The decree, like the decree of the former Sudder Court, was to be sent down to the Lower Court, and entry to be made of it in the register of the Lower Court, and execution sued out there. Every reason of policy which induced the Legislature to require that execution to be issued within three years was, presumably, as operative after the amalgamation of the Courts as it was before that event. Accordingly, one of the learned Judges who decided the case now under appeal has admitted that his construction involved consequences "absurd" in themselves and, presumably, contrary to the intention of the Legislature. He felt, however, bound by the words "Courts established by Royal Charter." It seems to their Lordships, considering the date and history of the Limitation Act, that the High Court of Madras and the High Court of Bengal, in its decision of the 12th June 1871, were warranted in holding that the High Courts, though unquestionably "Courts established by Royal Charter" in the broad and general sense of the term, were not, when exercising their appellate jurisdiction from the mofussil Courts, such Courts within the meaning of Act XIV of 1859.

There remains the difficulty occasioned by the use of the words "such Court," which has been adverted to in some of the Indian cases (1). But if those words be held to impart the Court issuing the process of execution, i. e., the Zillah Court, the difficulty would equally have applied to the decree of the former Sudder Court, which, not being the decree of a Court established by Royal Charter, would have been subject to no rule of limitation. It seems necessary to construe the words "such Courts" as meaning "any Court not established by Royal Charter within the meaning of the Act." On the whole, there-

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(1) *Act XIV of 1859, s. 20.*—"No process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree or order of such Court, unless some proceeding shall have been taken to enforce such judgment, decree or order, or to keep the same in force within three years next preceding the application for such execution."

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fore, though it is to be regretted that the Indian Legislature did not, upon the amalgamation of the Courts, provide more precisely for the application of the Limitation Act, and possibly of other statutes to the new Court, their Lordships are of opinion that the first question ought to be determined in accordance with the rulings of the High Court of Madras and the Full Bench of the High Court of Bengal. The sound and convenient rule is undoubtedly that the Court which has to execute the decree of the High Court should be governed by the rules which govern the execution of its own decrees : and their Lordships do not feel constrained by the words of the statutes or of the Letters Patent to adopt the contrary construction.

If this be so, the consideration of the second question is not necessary for the determination of this appeal, since it is admitted that the period of three years, if calculated from the date of the decree of the High Court, had expired before the application for execution was made. Nor, indeed, is the general question, upon which there have also been conflicting decisions in India, of much practical importance, since it is admitted that the date from which the three years are to be calculated is the date of the decree of the Appellate Court,—whether that decree is to be treated as the decree to be executed, or the appeal of which it is the termination is to be deemed “ a proceeding taken to keep the original decree in force.” That an appeal prosecuted to a decree would be such a proceeding is shown in the case of *Bipro Doss Gossain v. Ohunder Seekhur Bhattacharjee* (1), both by the judgment of the Full Bench delivered by Chief Justice Peacock, and also by the judgment of this Board, delivered by Lord Cairns, in the case of *Maharaja Dhiraj Mahtab Chand Bahadur v. Bulram Sing Baboo* (2), on the 14th of July 1870.

The state of the Indian authorities upon the general question seems to be this. In the case before us, the High Court obviously proceeded on the principle that a simple decree of affirmance did not so incorporate the mandatory part of the original decree as to make, for all purposes, the decree of the Appellate

(1) 7 W. R., 521, No. 583 of 1866.

(2) 5 B. L. R., 611.

Court the sole decree to be executed. And this ruling appears to have been followed in the case of *Chowdhry Wahid Ali v. Mullick Inayet Ali* (1), in which it was ruled that, in order to make the decree of the Appellate Court the final decree in the suit for all the purposes of execution, it was necessary that it should have decreed a material modification of the original decree. The rule so expressed seems open to the objection of vagueness. The Full Bench of the High Court of Bengal, however, in the decision of the 12th of June 1871 (2), already referred to, has ruled that, whether the decree of the Lower Court is reversed or modified, or affirmed, the decree passed by the Appellate Court is the final decree in the suit; and, in the words of Mitter, J., "as such, the only decree which is capable of being enforced by execution." And that is in accordance with the Madras decision already cited. Chief Justice Scotland's words are—"Whether that decree be in affirmance, or reversal, or modification of the decree appealed from, it becomes the final decree in the suit, and therefore the decree enforceable by execution" (3). The function of an Appellate Court is to determine what decree the Court below ought to have made. It may affirm, reverse, or vary the decree under appeal. In the first case, it leaves the original decree standing, superadding, it may be, an order for the payment of the costs of the appeal, or for interest on the amount originally decreed. In the other two cases it substitutes other relief for the relief originally given. In all these cases the decree of the Appellate Court may be regarded either as a direction to the Lower Court to make and execute a decree of its own accordingly, or as an independent decree, whether it is to be executed by the Appellate Court or by the Lower Court. In the latter case a further question arises, *viz.*, whether the original decree, if wholly affirmed (or so much of it as has been affirmed, if it has been partially affirmed), is to be treated as merged or incorporated in the decree of the Appellate Court as the sole decree capable of execution, or whether both decrees should be treated as standing, execution

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(1) 6 B. L. R., 52.

(3) *Arunchellathudayan v. Veludayan*,

(2) *Ram Oharan Bysak v. Lakhi Kant* 5 Mad. H. C. Rep., 215, p. 216.
Bannik, 7 B. L. R., 704.

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being had on each in respect of what is enjoined by the one, and not expressly enjoined by the other. In this country the nature and effect of a decree on appeal would seem to vary according to the nature of the decree under appeal, the constitution of the appellate tribunal, the proceedings in appeal, and the fact whether the record or merely a transcript is brought up. The determination, however, of the question before their Lordships must depend on the provisions of the Indian Code of Procedure. It is clear that, under that Code, whatever decree is executed, is to be executed by the Lower Court in which the record remains, or to which it is to be returned. But Sections 360, 361, and 362, which prescribe the form of the decree of the Appellate Court, direct a copy of it to be entered on the register, and treat that decree as a decree to be executed, seem to exclude the notion that it is a mere direction to the Lower Court to pass and execute a certain decree. If the question were *res integra*, their Lordships would incline to the view taken by the Judges of the High Court in the present case, *viz.*, that the execution ought to proceed on a decree, of which the mandatory part expressly declares the right sought to be enforced. Considering, however, that, for the reasons already given, the question is not of much practical importance, their Lordships will not express dissent from the rulings of the Madras Court (1) and of the Full Bench of the Bengal Court (2), further than by saying that there may be cases in which the Appellate Court, particularly on special appeal, might see good reasons to limit its decision to a simple dismissal of the appeal, and to abstain from confirming a decree erroneous or questionable, yet not open to examination by reason of the special and limited nature of the appeal. Their Lordships may further suggest that in all cases it may be expedient expressly to embody in a decree of affirmance so much of the decree below as it is intended to affirm, and thus avoid the necessity of a reference to the superseded decree.

From a passage in the judgment of Mitter, J., already

(1) *Arunachellathudayan v. Veludayan*, 5 M&D. H. C. Rep., 215, p. 216. (2) *Ram Charan Bysak v. Lakhi Kant Bannik*, 7 B. L. R., 704.

referred to, it appears to have been decided in India (1) that what are there termed "the decrees of the Privy Council," are not subject to any law of limitation. That question is not before their Lordships, and if it ever arises, must be determined on its own merits. The ground of the decision seems to have been that the order of Her Majesty in Council being an act done by virtue of her prerogative, it was not competent to the Indian Legislature to limit the time within which that order could be enforced. Their Lordships desire to say that they are not prepared, without full argument and consideration, to accept this ruling as correct. Should the question ever be brought here, it will have to be considered whether the order in Council, which is not, properly speaking, the decree of a Court, but an order of Her Majesty made on the recommendation of a Committee of Her Privy Council, does more than prescribe what shall be the final decree in the cause, leaving it to be executed by the ordinary process of the Courts in India. It may well thus finally ascertain and define the rights of the parties, without relieving them from the obligation imposed upon them by the general law of enforcing those rights with due diligence,—a matter with which the prerogative has no concern.

The result of what has been said is that the determination of this appeal must depend on the third question, *viz*, whether any proceeding sufficient to keep the decree in force within the meaning of the 20th section was had between the 8th of June 1863 and the 22nd of April 1867, the date of the application for execution. It has been argued that the presentation of the petition of appeal to England was such a proceeding, and that the period of limitation was to be calculated from the 9th of May 1866, when that petition was finally dismissed. It was further argued that the filing by the appellants of the petition consenting to the respondent's application for further time to prosecute his appeal was such a proceeding, and that the time was to be calculated from the date of the petition (the 8th of April 1865), or from the 4th of October 1865. when the

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(1) *Anandmayi Dasi v. Purno Chandra Roy*. Case No. 569 of 1865; 24th August 1866.

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two months granted expired. Their Lordships are of opinion that there is no ground for the first contention; that the respondent's petition of appeal, being a proceeding taken in order to destroy the decree, cannot of itself be treated as a proceeding to keep it in force; and in this opinion they are supported by all the Indian authorities cited, except the observations of Holloway, J., in the Madras case (1). It is, however, admitted that, had the appeal to England been allowed, the present appellants, being respondents to it, and, as such, supporting the decrees, would have been entitled to sue out execution at any time within three years at least after the final dismissal of that appeal. The appeal, it is true, never was allowed; but, during the period between the date of the presentation of the petition and that of its dismissal, the allowance of the appeal depended on the respondent's compliance with the rules which regulate the admission and allowance of appeals to England; and the appellants had a right to intervene and see that there was a compliance with these rules, particularly with such of them as relate to security, and, in the event of non-compliance, to insist on the dismissal of the petition. In their Lordships' opinion, there is, in this case, sufficient evidence that the appellants did so intervene. The petition, by which they consented to the application for two months' further time, is pregnant evidence of this fact; for unless they had then been active parties to the proceedings, their consent would have been unnecessary. Their Lordships, therefore, though they would have been glad to have had fuller evidence of what was actually done in this matter, have come to the conclusion that there was at that time such a *contestatio* between the parties touching the allowance of the appeal to England as suffices to bring this case within the principle laid down by Lord Cairns in the case of *Maharaja Dhiraj Mahtab Chand Bahadur v. Bulram Sing Baboo* (2) already referred to, and to relieve their Lordships from the necessity of depriving the appellants of the fruits of what appear to be just decrees by the application of the statute of limitations.

(1) *Arunachellathudayan v. Veludayan*, (2) 5 B. L. R., 611.
 5 Mad. H. C. Rep., 45.

Their Lordships, therefore, will humbly advise Her Majesty that this appeal ought to be allowed; that the orders of the Zillah Judge and of the High Court ought to be reversed; and that the appellants ought to be declared entitled to sue out execution of the decrees, and to recover also the costs of the proceedings in execution in both the Indian Courts. They will also be entitled to the costs of this appeal.

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Appeal allowed.

Agent for appellants : Mr. Barrow.

Agent for respondents : Mr. Wilson.

APPELLATE CIVIL.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Bayley.

POORNO SINGH MONIPOOREE, AND OTHERS (DEFENDANTS) v.
HURRYCHURN SURMAH (PLAINTIFF).*

1872
Sept. 4.

Pre-emption—Europeans—Cachar.

The right of pre-emption arises from a rule of law by which the owner of the land is bound. It is essential that the vendor should be subject to the rule of law. Therefore, where the vendor of certain land situate in Cachar was a European, the Court held that there was no right of pre-emption.

THIS was a suit brought by Hurrychurn Surmah against Thomas Ackroyd, as am-mooktear of Charles Koeglar and A. Huni, vendor, and Poorno Singh, Monipooree, and others, purchasers, to enforce his right of pre-emption and to obtain possession of certain land in Mouzah Nemye Chandpore, in Pergunnah Hallakandy, in Cachar.

The defendants contended that although, by local custom, the law of pre-emption applied to Hindus in some places, it had nothing to do with Europeans; that, even if it did apply to Europeans, the preliminaries had not been duly performed; and that the plaintiff was neither a neighbour nor a co-partner.

The Deputy Commissioner of Cachar fixed (*inter alia*) the following issues :—

* Regular appeal, No. 204 of 1871, from the decrees of the Officiating Deputy Commissioner of Cachar, dated the 11th June 1871.

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"Are Europeans bound by the law of pre-emption in Cachar?" and "Are the purchasers and pre-emptor affected by the fact that the vendor is a Christian?"

He found that no proof had been adduced by the plaintiff to prove that the custom applied to Europeans; that the plaintiff's right was not thereby lost, as the purchaser was a Hindu; that the custom of pre-emption prevailed in Cachar; that the right belonged to the Hindu pre-emptor. He further found that the preliminaries had been duly performed. He accordingly passed a decree in favor of the plaintiff for possession of the land in dispute on payment of Rs. 6,500, and dismissed the suit as against Thomas Ackroyd with costs.

The defendants, Poorno Singh, Goona Singh, and Jadub Singh, Monipoorees, appealed to the High Court.

The *Advocate-General*, *offg.* (Mr. Paul), (Mr. Collis with him) for the appellant.

Mr. Woodroffe (Baboo Tarrucknath Sen with him) for the respondents.

The *Advocate-General* (for the appellant) contended that there was no evidence that the custom of pre-emption prevailed throughout Cachar. It must be proved that the custom is applicable to Christians; it must be shown that they have adopted it.—*Baboo Moheshee Lal v. Christian* (1). The plaintiff must show that the claim was binding against the defendants—*Baboo Mohesh Lall v. Christian* (2). Mahomedan law of pre-emption is not binding on any purchaser other than a Mahomedan—*Sheikh Kudratulla v. Mahini Mohan Shaha* (3). The right of pre-emption exists against the vendor only, who moreover must be a Mahomedan.

Mr. Woodroffe (for the respondents) contended that the custom prevails in Cachar. The right of pre-emption does not create a disability in the vendor, but it is the right of the pre-emptor. A local custom binds all the people of the locality.

(1) 6 W. R., 250 (2) 8 W. R., 446. (3) 4 B. L. R., F. B., 184.

The right can be claimed by all persons without distinction of creed; see Macnaghten's Mahomedan Law, Ch. iv, para. 4. As the custom prevails in Cachar, the defendants are bound by the custom. *Baboo Mohesh Lall v. Christian* (1) does not apply to the present case. The right of pre-emption attaches against the purchaser, not against the vendor, therefore the creed of the vendor is immaterial—*Mussamut Ladun v. Bihro Ram* (2). [BAYLEY, J.—The law directs the pre-emptor to go to the vendor to cry aloud,—“I have purchased, &c.”] The pre-emptor may go to the vendor or vendee, or to the land sold. The person to be diseised, is the person against whom the right is claimed, that is, the vendee, for the right of pre-emption does not arise before the sale is complete. If any right remained in the vendor, no right of pre-emption would arise—*Gurdayal Mundar v. Raja Teknarayan Sing* (3).*

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The Advocate-General in reply.

COUCH, C.J.—In the first of these appeals Porno Singh, Goona Singh, and Jadub Singh, Monipoorees, the defendants, Nos. 2, 13, and 38 in the original suit, are the appellants, and the principal objection taken in the grounds of appeal is that the right of pre-emption claimed by the plaintiff did not exist as to all or any part of the land in suit, as the vendors to the appellants and their co-defendants were Europeans.

No issue was raised in the suit as to whether the law of pre-emption prevailed by local custom in Cachar where the land is situated, or as to whether the appellants as Hindus were bound by it. The appellants in their written statement alleged that the law had nothing to do with Europeans from whom they purchased; that the plaintiff was not a co-sharer or a “neighbour;” and that he never legally performed, or observed the necessary preliminaries. This being a regular appeal, if it appeared to us essential to the right determination of the suit upon the merits that the other questions should be determined, we might, under s. 354 of the Code of Procedure refer them to the Lower Court to

(1) 8 W. R., 446. (2) 8 W. R., 255. (3) B. L. R., Sup. Vol., 166,

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be tried ; but we think it is not essential, as, in our opinion, the case is not within the law of pre-emption, assuming that it does prevail in Cachar, and that the appellants, the purchasers, are governed by it.

The plaintiff who claims the right of pre-emption is a Hindu, and the vendor, Mr. Ackroyd, is a European. The Deputy Commissioner on the issue which was framed, "Are Europeans bound by the law of pre-emption in Cachar?" says he finds that only two cases are on record in the Courts in Cachar in which Christians or Europeans have been parties in cases of this nature, and that he does not think that these two cases afford any positive evidence on the subject. Having said this and found that issue for the defendant Ackroyd, upon which he dismissed the suit against him with costs, he proceeded to decide upon the last issue he had framed as to whether the purchasers and pre-emptor are affected by the fact that the vendor is a Christian, that they are not. The reasons he gives for this are that it does not appear to him to be just that the privilege should extend to the Hindu purchasers who have nothing to do with the seller's exemption, and that it seems to him that in Cachar it is most important that the right of a sharer in land to pre-emption should be most carefully guarded. The law of pre-emption was much considered in *Sheikh Kudratulla v Mhini Mohan Shaha* (1), where it was held by the late Chief Justice and Kemp and Mitter, J.J., that a Hindu purchaser is not bound by the law in favor of a Mahomedan co-partner, although the co-partner from whom he purchased was a Mahomedan, the plaintiff having failed to prove that the Hindus in the district had adopted the custom. On the other hand, Norman and Macpherson, J.J., held that, whenever a Mahomedan has a right of pre-emption, it is not defeated by the mere fact that the purchaser is a Hindu. The question was referred to a Full Bench in three cases, but in all of them the vendor was a Mahomedan, and the question raised in this appeal did not arise. In the argument before us for the respondent, some expressions of Mitter, J., and the Chief

(1) 4 B. L. R., F. B., 134.

Justice were relied upon as showing that the vendor need not be a Mahomedan, but I think no such inference can be drawn from them. That question was not under consideration, and the words were used with reference to a case in which the vendor was a Mahomedan. Mr. Woodroffe, who appeared for the respondent, admitted that he could not produce any case in which the law of pre-emption had been applied, and the vendor was not governed by it either as a Mahomedan or by custom. The absence of any such case, the law being frequently insisted upon, goes far to show what is the law. It appears to us that the right of pre-emption arises from a rule of law by which the owner of the land is bound. When a Mahomedan acquires land, it becomes subject to the law in the same manner as it becomes subject to his law of inheritance. If there ceases to be an owner who is bound by the law, either as a Mahomedan or by custom, the right no longer exists. It is not annexed to the land so as to continue to affect it when it has been transferred to a person not bound by the law. The right also is not a mere personal one in the pre-emptor. "The cause of it is the junction of the property of the *shafee*, or person claiming the right with the subject of purchase," Baillie, 471. He has it only as a co-sharer or neighbour, and on his ceasing to be either his right is gone. We think it is essential that the vendor should be subject to the rule of law. If it were not so, a Mahomedan might become a partner in an estate owned by Christians or Hindas, which they could not prevent, and then he might prevent their selling their shares to any other person.

The decision of the Lower Court that the law of pre-emption applied in this case is therefore, in our opinion, wrong; and on this ground the decree should be reversed, and the suit dismissed with costs as against all the defendants.

Upon the fourth issue, the Deputy Commissioner says—"There can be no doubt whatever that Haro Thakoor (the plaintiff) fully and exactly performed all the preliminary conditions necessary to enforce the right of pre-emption when he heard of the sale on the spot to the purchasers and the seller, that is to say, if the real sale was the sale on 18th May. The evidence on these points is perfectly good." We think there may be some, if not

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considerable, doubt whether the preliminary conditions were performed, and whether there was any thing more than an attempt by the plaintiff to induce the purchasers to give up their bargain to him; and it would be more satisfactory if the judgment showed that the Deputy Commissioner had carefully considered the evidence. He may have done so, and we must suppose that he has: but his judgment on either issue raises a suspicion that he has not given the question the full consideration it required. As we are of opinion on the other ground that the suit should be dismissed, we think it is not necessary to decide whether the preliminaries were duly performed.

Appeal allowed.

ORIGINAL CIVIL.

Before Mr. Justice Macpherson.

MOTHOORMOHUN ROY v. JADOOMONEY DOSSEE AND ANOTHER.

1872
Dec. 11.

Jurisdiction of High Court—Cause of Action—Promissory Note—Letters Patent, 1865, cl. 12.

See also
14 B.L.R. 368.
13 B.L.R. 464.

The High Court has no jurisdiction to entertain a suit brought upon a promissory note made without, but payable within, the local limits of its jurisdiction leave to institute the suit not having been first obtained.

THIS was a suit to recover the principal and interest due on a promissory note executed by the defendants at Shamnagger, and made payable to the plaintiff in Calcutta. Leave to sue had not been obtained before the institution of the suit.

Mr. Branson and Mr. Sutherland for the plaintiff.

Mr. Woodroffe and Mr. Fergusson for the defendants.

Mr. Woodroffe took the preliminary objection that the Court had no jurisdiction.

Mr. Branson.—The defendant's written statement does not raise the question of want of jurisdiction, and it is too late to raise it now. [Mr. Woodroffe.—The plea of want of jurisdic-

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tion can be raised at any stage of the proceedings; and if the defendant omits to plead it, the Court will, of its own motion, take cognizance of it. **MACPHERSON, J.**—If the cause of action arise partly within the jurisdiction, may I not now give the plaintiff leave to sue under cl. 12 of the Letters Patent, 1865? **Mr. Woodroffe.**—I submit not: leave to sue must be obtained before the institution of the suit—*Shaikh Abdoel Hamed v. Promothonath Bose* (1).] In the case of *DeSouza v. Coles* (2) in which the question of jurisdiction was fully discussed, and the authorities reviewed, **Holloway, J.**, laid down that there is a competent *forum* wherever a place can be indicated to which the right and its infraction can both be referred, because there is a cause of action and the whole cause of action. The immediate cause of action, and not the cause of that cause of action is what gives jurisdiction. Here the note was payable in Calcutta, and the immediate cause of action, therefore, arose within the jurisdiction. In *Luckmee Chund v. Zorawur Mull* (3), where advances were made in pursuance of a partnership contract, the Privy Council held that the cause of action for the balance of such advances arose at the place where the payment of such balance would have to be made. Where decisions of the Privy Council are in conflict with decisions of the Courts at Westminster, this Court must attach greater weight to the decisions of the former tribunal; and the more so since the common law decisions depend upon the narrow construction of the Country Courts' Acts. The High Court has a more extensive jurisdiction than an English County Court. If the defendants' contention be correct, there would be a class of cases which could not be brought as of right in any Court, a result which could never have been intended by the Legislature. The Full Bench ruling of the Agra High Court in *Prem Shook v. Bhseekoo* (4) supports the plaintiff's view.

Mr. Woodroffe.—The case of *DeSouza v. Coles* (2) has been dissented from by **Phear, J.**, in *Harjiban Das v. Bhagban Das* (5). *Luckmee Chund v. Zorawur Mull* (3) is distinguishable; it was

(1) 1 I. Jur., 218.

(4) 3 Agra H. C. Rep., 242.

(2) 3 Mad. H. C. Rep., 384, at p. 414. (5) 7 B. L. R., 102.

(3) 8 Moo. A., 291.

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a decision upon the Bengal Regulation II of 1803, the language of which differs widely from that of cl. 12 of the Letters Patent. So the case of *Prem Shook v. Bheekoo* (1) was upon the construction of Act VIII of 1859, s. 5. In cl. 12 of the Letters Patent, the words "if the cause of action shall have arisen wholly, or in part," clearly show that the Legislature regarded the cause of action as something divisible; see *Cherry v. Thompson* (2), *Sichel v. Boroh* (3), *Issurchunder Seem v. D'Cruz* (4) and *Greeschunder Bonnerjee v. Collins* (5). To the argument founded upon the probable intention of the Legislature, it may be answered that the domicile of the defendant would always give a complete *forum*—*Cherry v. Thompson* (2). The High Court on its original side is only a District Court, having Calcutta for its district: it has no such extensive jurisdiction as is contended for—*The Indian Carrying Company v. McCarthy* (6) and *Sreemutty Lalmonay Dossee v. Juddoonauth Shaw* (7).

MACPHERSON, J., held that the Court had no jurisdiction to entertain the case. The suit was accordingly dismissed, but without costs.

Suit dismissed.

Attorneys for the plaintiff: Messrs *Swinhoe, Law and Co.*

Attorney for the defendants: Mr. *Carruthers*.

(1) *Agra H. C. Rep.*, 242.

(2) *L. R.*, 7 Q.B., 573.

(3) 2 H. & C., 954.

(4) 1 I. Jur., 233.

(5) 2 Hyde, 79.

(6) 1 I. Jur., 61.

(7) *Id.*, 319.

[PRIVY COUNCIL.]

HELEN SKINNER (APPELLANT) v. SOPHIA EVELINA ORDE AND
OTHERS (RESPONDENTS.)

P. C.*
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Dec. 11, 12,
& 20.

[On appeal from the High Court of Judicature, North Western Provinces,
Allahabad.]

Guardian and Ward—Custody of Child—Act IX of 1861—Religion—Adoption of Mahomedan Religion for Purpose of Marriage—Bigamy—Special Leave to appeal.

A child, the offspring of a Christian marriage, was living after her father's death under the protection of her mother. A married man, a Christian, came to live with her mother, and, in order to legalize their intercourse, he and the mother became Mahomedans, and were married in Mahomedan form. About three years after, when the child had attained the age of fourteen, some of her relatives applied for and obtained an order, under Act IX of 1861, that the girl be removed from the guardianship of the mother and her second husband and placed under a Christian guardian. The girl deposed that she wished to remain with her mother and to become a Mahomedan. Special leave having been given to appeal to the Privy Council, the order was upheld.

Quære.—Whether a marriage according to Mahomedan rites between a married Christian man and a Christian woman, both of whom became Mahomedans in order to effect the marriage, is valid (1).

THIS was an appeal from an order of the Judge of Meerut of the 19th May 1870, and orders of the High Court at Allahabad, whereby an infant was removed from the guardianship of her mother under the following circumstances:—

George Skinner, an illegitimate son of a British subject by a native woman was a Christian, and was duly married according to the Christian rites to the appellant. He was killed in the mutiny, and left an infant daughter, Victoria Skinner, who lived with her mother. The girl was entitled to about Rs. 400 a

* *Present*:—THE RIGHT HON'BLE SIR JAMES COLVILLE, LORD JUSTICE JAMES, LORD JUSTICE MELLISH, SIR M. SMYTH, SIR R. COLLIER, and SIR LAWRENCE PEAR.

(1) See s. 15 of Act III of 1872 (to provide a form of marriage for persons who do not profess the Christian, Jewish, Hindoo, Mahomedan, Parsee, Buddhist, Sikh, or Jaina religion) as to penalty on married person marrying again under that Act.

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month from her father's landed estate. In 1867, a Mr. John, who was a married man and a Christian, came to live with Mrs. Skinner, and shortly after, in order to enable him to marry her he and Mrs. Skinner both became Mahomedans and were married. In 1869, the child being then thirteen, and having been brought up as a Christian, was removed from school by her mother, who took her to live with John and herself, and the child then began to live behind the *purdah* as a Mahomedan, and she was alleged to have renounced Christianity and to have become a Mahomedan. The respondents, as her father's friends, interfered; and, in March 1870, the girl being then fourteen, applied to have her removed from the custody of her mother and John, and to have a guardian appointed, and to have an account of the rents and profits of the estate. The mother and John opposed the application on the ground that the Court had no jurisdiction, the child being a European British subject; that she had not been influenced to change her religion, but did it of her own free will; and that the mother was entitled to the custody of her child, the mother not living in adultery, but being actually married. They also alleged that the respondents had a hostile feeling towards them personally. The Judge ordered that the Collector should take charge of the estates, and that the girl should be removed from her mother and placed under a guardian to be chosen, unless the parties could consent, by the Court. On appeal the High Court (Turner and Spankie, J.J.) confirmed the order save as to placing the Collector in charge, and appointed a Miss Scanlan guardian of the person, with an allowance for the maintenance of the minor, and giving liberty to the mother, relations, and friends (save Mr. John) to visit her. A Mr. Bailey was appointed guardian of the estate subject to the orders of the Court.

The mother appealed to Her Majesty in Council by special leave.

Sir R. Palmer, Q.C., and Mr. Cave for the appellant.—The mother is the natural guardian, and is not living an unchaste life, and her child cannot be taken from her—*The King v.*

Greenhill (1), *The Queen v. Clarke* (2), *Stourton v. Stourton* (3). The custody will not be altered on account merely of the greater benefit to the child—*In re Curtis* (4). The child of a Hindu must be left with its father, even though it wishes to become a Christian—*The Queen v. Nesbitt* (5). Change of religion 'in the parent is no ground—*The Queen v. Shapurji Bezonji* (6). The father here is said to have been Christian, but that seems doubtful. The question was discussed in the Skinner's family suit—*Barlow v. Orde* (7). The child's wishes ought to be consulted—*Witty v. Marshall* (8).

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Mr. Charles Pollock, Q.C., Mr. Davey, and Mr. Chalmers for the respondents.—It is clear that the father was a Christian, and his wishes will be assumed to be that his child should follow that religion—*In re North* (9), *Austin v. Austin* (10), *In re Newbery* (11), and *Jones v. Powell* (12). The English law, and not the Mahomedan, is to be looked to in this case—*Abraham v. Abraham* (13). There are no circumstances to take this out of the rule as to bringing up a child in its father's religion—*Hawksworth v. Hawksworth* (14), *In re Darcy* (15). *The Queen v. Clarke* (2), and *In re O'Malley* (16).

Sir R. Palmer, Q. C., in reply.

Their LORDSHIPS delivered the following judgment :—

This is an appeal from an order of the High Court of the North-West Provinces, in substance confirming an order of the Zillah Judge, removing an infant ward and her property from the custody and guardianship of her mother the appellant, and the second husband of that mother.

(1) 4 Ad. & E., 624.

(2) 7 E. & B., 186.

(3) 8 DeG. M. & G., 760.

(4) 28 L. J., Ch., 458.

(5) Perry's Or. Cas., 103.

(6) *Id.*, 91.

(7) 5 B. L. R., 1.

(8) 18 C., Y. Ch. Rep., 68.

(9) 11 Jur., 7.

(10) 34 Rev., 257.

(11) 1 L. R., Eq., 431.

(12) 9 Beav., 345.

(13) 9 Moo. I. A., 193.

(14) 6 L. R., Ch., 529.

(15) 11 Ir., O. L. R., 298.

(16) 8 Ir., Ch. Rep., 291.

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The application was made to the Judge under the provisions of the Indian Act No. IX of 1861, which are as follow :—

“ 1. Any relative or friend of a minor who may desire to prefer any claim in respect of the custody or guardianship of such minor, may make an application by petition, either in person or by a duly constituted agent, to the principal Civil Court of original jurisdiction in the district by which such application, if preferred in the form of a regular suit, would be cognizable; and shall set forth the grounds of his application in the petition. The Court, if satisfied by an examination of the petitioner, or his agent if he appear by agent, that there is ground for proceeding, shall give notice of the application to the person named in the petition as having the custody, or being in the possession of the person of such minor, as well as to any other person to whom the Court may think it proper that such notice should be given, and shall fix as early a day as may be convenient for the hearing of the petition, and the determination of the right to the custody or guardianship of such minor.

2. The Court may direct that the person having the custody, or being in possession of the person of such minor, shall produce him or her in Court, or in any other place appointed by the Court on the day fixed for the hearing of the petition, or at any other time, and may make such order for the temporary custody and protection of such minor as may appear proper.

3. On the day appointed for the hearing of the petition, or as soon after as may be practicable, the Court shall hear the statements of the parties, or their agents if they appear by agents, and such evidence as they or their agents may adduce, and thereupon shall proceed to make such order as it shall think fit in respect to the custody or guardianship of such minor and the costs of the case.”

The Judge accordingly made the provisional order on the *ex parte prima facie* case presented to him, appointed a day for hearing it, heard it, and made an order, removing the ward from her mother. An appeal was presented to the High Court, which pronounced the order complained of. The Act gives no further power of appeal: but on the statement that the real question was as to the religious education of the ward, and that considerations of importance as regards the religious feeling of the Christian and Mahomedan populations of India were, or might be, involved in it, special leave was given by Her Majesty,

on the recommendation of this Board, to present to Her Majesty in Council the appeal now to be disposed of.

Several English cases have been cited to their Lordships, and one is referred to and relied on in the judgment of the High Court; and it is, obviously, of very great assistance to the Courts in India and to this Board to see how, in the exercise of a similar jurisdiction for the same object, the Courts in this country have thought it best to act for the protection and welfare of infant wards. The course of decision in the English and Irish Courts of Chancery has been such as to lay it down as a matter of positive law of the Court that, in the matter of religious education,—great and, in the absence of controlling circumstances, paramount—weight should be given to the expressed or implied wishes of the deceased father. It was contended, with some plausibility before their Lordships, that this rule had its origin in the statutory power of English fathers to appoint guardians for their children.

However this may be, their Lordships do not think it necessary or desirable, for the determination of this case, to refer to or rely on any such rule. The Indian Act certainly does not expressly refer to any such right, and appears to have had one object in contemplation, the protection of the infant ward, and to have given the Judge (subject, of course, to appeal) the power, and to have imposed on him the duty, of doing what, in his judgment, is best for the infant, and no other power or duty.

In India, however, all, or almost all, the great religious communities of the world exist side by side under the impartial rule of the British Government. While Brahman and Buddhist, Christian and Mahomedan, Parse and Sikh, are one nation, enjoying equal political rights and having perfect equality before the tribunals, they co-exist as separate and very distinct communities, having distinct laws affecting every relation of life. The law of husband and wife, parent and child, the descent, devolution, and disposition of property, are all different, depending in each case on the body to which the individual is deemed to belong: and the difference of religion pervades and governs all domestic usages and social relations. From the very necessity of the case, a child in India, under ordinary circumstances,

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must be presumed to have his father's religion, and his corresponding civil and social *status*; and it is therefore ordinarily, and in the absence of controlling circumstances, the duty of a guardian to train his infant ward in such religion.

What are the facts of the present case? Beyond all question the ward was the child of a Christian father, the issue of a Christian marriage. She was left an infant of very tender years, her father being one of the victims of the great outbreak and massacre at Delhi in the year 1857. She remained thenceforth under the protection of her mother, a lady, apparently, of ancestry, not Christian, and with no great knowledge of Christian tenets or attachment to Christian habits; but she was married to a Christian in a Christian church, and does not appear to have professed any other faith, or to have reverted in costume or customs to her ancestral faith until the autumn of 1867. The child up to that time had certainly been brought up, and, so far as she was educated at all, educated as a Christian girl, eating, drinking, and associating with her Christian cousins, and going to a school. In the autumn of 1867 this occurred. The house of the widow became the house of one John Thomas John, a clerk of inferior grade in the Judge's Court, and they lived and cohabited together as husband and wife; John Thomas John being already the husband in Christian marriage of a living Christian wife. It is suggested that this union was sanctified and legalized thus—that the widow became a Mahomedan, that John Thomas John became a Mahomedan, and that having thus qualified himself for the enjoyment of polygamous privileges, he contracted in Mahomedan form a valid Mahomedan marriage with the widow, the appellant. The High Court expressed doubt of the legality of this marriage; which their Lordships think they were well warranted in entertaining. But however this may be, their Lordships can entertain no doubt that, when the connection between John Thomas John and the widow was formed, whether it was merely adulterous, or under the cover of a Mahomedan marriage, the home was no longer a fit home for a Christian young girl: and, if the matter had then been brought to the notice of the Judge, it would have been his plain duty, without delay, to find a more suitable home

and guardianship than what had become in fact the home and guardianship of John Thomas John. The matter was not, however, brought so soon as it ought to have been to the attention of the Judge. Some relatives interfered, in order that the child might be sent to a proper school—a proper Christian school; and John Thomas John and his wife, professing to yield to the suggestion, took the girl in June 1869 up to Simla, with the avowed object of placing her at a school—a Christian school there. They then represent that this project failed, by reason of the girl's refusal to go to school; and that she began to express a preference for the Mahomedan religion, and the oriental mode of feminine life in seclusion behind the *purdah*; and that at some period (the time is not exactly fixed), a Moulvie was introduced, who confirmed her in her resolution to become a Mahomedan. The young lady, who by this time had attained the age of fourteen years, or thereabout, made a deposition:—

DEPOSITION of Victoria Skinner, otherwise Nau Shaba Begum, before me, on solemn affirmation, under Act V of 1840, on the 1st April 1870.

I know Mr. John. I first knew him when we came to Meerut, and for the past two years know him well. No one has ever persuaded me to be a Mussulmani. My own feelings alone have prompted me. I wish to remain a Mussulmani. I would not be persuaded to become a Christian, because it is from my own conviction that I am a Mussulmani. I am in the *purdah* by my own free will. I went up to Simla with my mother and Mr. John. They wished me to go to school, and pressed me very much to go, but I would not consent. I heard of the marriage, of my mother to Mr. John five or six days after it took place. I cannot say how long Mrs. James Skinner has known of the marriage, but she must have known of it a long time, as they have lived together for two years, and it has been matter of notoriety. I believe all Mrs. Skinner's family must have known of it. I wish to return to my mother. I believe Mr. James Skinner to be a Mussulmani—Mrs. Orde to be a Christian.

To Counsel for Petitioners.—My mother can read very little—small story books; but she cannot read Persian, nor write at all. She can only read the Urdu in print, not the written character, excepting very good text-band. I have read easy books on religion in Urdu, but not studied them. I am studying the Koran with a teacher. There

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was a picture of my father, and there were several other pictures; but as I had heard that it was strictly forbidden to keep pictures by our religion, I therefore destroyed them with my own hands. The picture was on paper in a frame with glass. It was destroyed soon after we returned from the hills. I heard that to keep pictures was prohibited, after my return from the hills, from a preacher, a Moulvie who came to the house and preached a sermon. No one advised me otherwise. I had long thought of becoming a Mussulmani, but when I was young did not understand the different religions; when I returned from the hills, I turned my attention to it and had the preacher called to preach. Almost all my family are Christians. I have had no intercourse during the last six or seven months with any others who are Christians, but their family and Mrs. Benu. Since I have been in their house, I have not had any letter of any kind from Mr. John. I had some letters from my cousin Sophy, who is in Calcutta, and Charlie, which were on my table. These I sent four Two from Charlie I sent for the day before yesterday, which were old, and I tore them up; the other from Sophy I sent for yesterday, and showed it to Mrs. Aldwell. The two from Charlie I sent for by Achakrai, and the one from Sophy by my ayah.

To Counsel for Petitioners.—I know Mrs. Benu. I have seen her several times since I came from Simla. I know her to be a Christian.

This evidence was, with the consent of the Counsel on both sides, and also of the principal parties, though the questions and answers were put and given in the vernacular of the country, Urdu, recorded by the Court in English, and was read over to the witness in Urdu, and by her acknowledged to be correct.

The case of the appellant was, in fact, rested on this deposition. An eloquent appeal was made to their Lordships' feelings not to sanction such a violation of the young lady's present religious convictions and natural feelings as was involved in tearing her from her Mahomedan home and mother, and committing her to the care of a strange Christian schoolmistress. The Judges of the High Court, however, did not think that deposition sufficient to induce them to abstain from making, in July 1870, the order for the removal of the guardian, which would have been the only possible order that could have been made in 1867. Their Lordships cannot dissent from that conclusion. It would be very easy, of course, for a mother under such circum-

stances to procure from a young daughter the expression of a wish to remain with her and to become a Mahomedan like her, rather than continue a Christian and go to a strange school : and it is impossible, in their Lordships' judgment, to believe that, in the interval which had occurred between the visit to Simla and the application to the Court, any such knowledge of the differences between the two religions had been acquired, or any such settled conscientious convictions had been formed as to make it really likely that her moral and religious condition would be endangered by placing her where she should receive the secular and religious instructions and training which she ought to have long previously and without interruption enjoyed. Their Lordships are, therefore, of opinion that the order, in so far as it removed the ward from her mother and step-father, and placed her under a Christian guardian, was right, and that is really the only matter that has been brought before them.

Their Lordships will humbly report to Her Majesty that in their opinion the order of the High Court ought to be affirmed, and this appeal dismissed with costs.

This recommendation of their Lordships is, of course, without prejudice to any application to be made by or on behalf of the ward concerning her future position ; and, considering the present age of the young lady, their Lordships think it would be very proper for the Court to ascertain for itself what her present opinions and wishes are, and what, having regard to those wishes and opinions, would in the present state of things be best for her.

Affirming the principle of the order, their Lordships feel that it would be very difficult for an appellate tribunal in this country to interfere without injury as to the details of the particular guardianship and scheme which must so essentially be a matter of *quasi*-parental discretion, to be exercised on the spot by those best acquainted, or best able to acquaint themselves, with all the circumstances, and their Lordships disclaim any desire so to interfere. But they suggest, for the consideration of the Court of India in similar cases, that while selecting a school (such, for example, as Miss Scanlan's in this instance), it would be desirable, where practicable, to have some independent person as

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guardian, to whom the ward could apply, in whom the Court and the ward could confide, and whose duty it would be to communicate to the Court any matter which might arise.

Appeal dismissed.

Agents for appellant : Messrs. *Watkins* and *Lattey*.

Agents for respondents : Messrs. *Ellis* and *Ellis*.

ANUND LOLL DASS (PLAINTIFF) v. JULLODHUR SHAW AND
ANOTHER (DEFENDANTS).*

[On appeal from the High Court of Judicature at Fort William in Bengal.]

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Act VIII of 1859, ss. 235 & 240—Execution—Private Alienation.

The prohibition against private alienation of attached property contained in s. 240, Act VIII of 1859, relates only to alienation which would affect the creditor who obtained the attachment-

THIS was an appeal from a decision of the Calcutta High Court, dated 31st July 1868, affirming a decision of Norman, J., in the original civil jurisdiction, dated 20th December 1867 (1).

Russickchunder Soor on 10th March 1866 mortgaged the property in dispute to Parbuttychurn Soor to secure Rs. 7,000 due, 10th September 1866.

On the 18th September 1866, Nettychunder Paul got a decree against Russickchunder for Rs. 1,100 odd.

On the 26th September, Baneymadhub Banerjee also obtained a decree for Rs. 3,000.

On the 28th September, Inderchunder Johurry obtained a decree for Rs. 1,500, and on the same day obtained an order for attachment of the property.

On the 29th September, Nettychunder obtained an order for attachment in his suit ; but, having made a mistake in the description of the property, the writ was returned unexecuted.

* *Present* :—SIR JAMES W. COLVILL, SIR M. SMITH, SIR B. P. COLLIER, and SIR LAWRENCE PEEL.

(1) 2 B. L. R., F. B., 49.

On the 13th November, Russickchunder agreed to sell the property to the respondents.

On the 17th November, Baneymadhub Banerjee obtained an order for attachment in his suit.

On the 19th November, the sale to the respondents was effected, and the mortgage to Parbuttychurn Soor, and the judgment-debts due to Inderchunder Johurry and Baneymadhub Banerjee were paid off.

On the 21st November, Nettychunder Paul obtained a second order for attachment, and the property was, on the 22nd November, attached by the Sheriff.

On the 27th and 28th November, the Sheriff received notice to remove the attachments in Inderchunder Johurry and Baneymadhub Banerjee's suits.

On the 11th January 1867, an order was made in Nettychunder Paul's suit for the sale of the property, and on the 21st February (1), it was sold by the Sheriff to the appellant.

On the 18th July 1867, the appellant, not being able to obtain possession, filed his plaint against the respondents, impeaching their title on the ground that the private sale, having been effected while the two attachments were in force, could pass nothing.

A question as to the *bona fides* of that private sale was decided in the respondents' favor. On the 20th December 1867, Norman, J., dismissed the suit, thereby supporting the validity of the private purchase; and on appeal to a Full Bench (Peacock, C.J., L. S. Jackson, Macpherson, Markby, and Mitter, JJ.), it was held by a majority (Markby, J., dissenting) that the decision of the first Court was right.

The judgments are set out at length in the report (2).

Sir R. Palmer, Q. C., and Mr. Doyme for the appellants.—The question is, does the absolute prohibition under the attachments operate for the benefit of all creditors, so as to prevent a private purchaser acquiring a title to an estate, or is the prohibition only such as prevents an alienation to the prejudice of the parti-

(1) In the report of the case before stated to have been on the 22nd of the High Court, the Sheriff's sale was February.

(2) 2 B. L. R., F. B., 49.

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ular execution-creditor? Under s. 206 of Act VIII of 1859, money payable under a decree is to be paid into Court, and no adjustment of a decree is to be made save through the Court. The object is to guide all persons interested as subsequent execution-creditors in the enforcing of their claims. The recognition here of a settlement, without the intervention of the Court, is contrary to the letter and spirit of the Act. *Nettychunder's* first attachment was inoperative from a mere mistake, whereby he lost his priority, but he would still be entitled to have his decree protected. The words of s. 235 show how stringent the words of the prohibition are to be, and s. 240 declares any alienation to be null and void. S. 243 shows that a private sale, in order to be good, must be sanctioned by the Court, and s. 245 directs what is to be done. The reference by Norman, J., to Bishop's leases has nothing to do with the present point; the question there being whether the alienor would be estopped, and the case cited by him of *Banes Surnamoyee v. Maharaja Sutteeschunder Roy Bahadoor* (1) relates to a wholly different question. It is not contended that the alienor would not be estopped. There would appear to be no answer to Markby, J.'s decision. There is no bankruptcy law save in the presidency towns, and it is the proper policy of the law to prevent private arrangements by way of preference which may injure creditors. The property is in the custody of the law, and it can only be relived from such custody by an act of the Court. S. 243 seems to have been entirely overlooked by the Court. When the property has once been attached, it is to remain until sold or released by order of the Court. All execution-creditors have an interest under ss. 270, 271 in the proceeds after satisfaction of the first executed attachment.

Mr. *Field*, Q.C., and Mr. *Leith* for the respondents were not called upon.

Their LORDSHIPS gave the following judgment:—

The facts under which this question arises may be thus, shortly stated:—A obtains an execution against his debtor

(1) 10 Moo. I, A., 123.

in the form of an attachment against the debtor's real property. The debtor, with the consent of *A*, makes a private sale of the property, and out of the proceeds satisfies the debt, but no application is made to the Court for the confirmation of the sale, or for the removal of the attachment, and the attachment still remains, at all events formally, in force. Subsequently *B*, another creditor, obtains an attachment upon another judgment. He proceeds to a judicial sale, treating the former sale as void; and the question is whether the purchase under the second sale has a good title and is entitled to say that the prior sale was to all intents and purposes void as against him?

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Their Lordships adopt the view taken by the late Norman, J., in the first instance, and by the majority of the Court above, including the Chief Justice, upon appeal. The question turns mainly upon the interpretation of two sections of Act VIII of 1859, under the head "Execution of decrees for money by attachment of property," and in construing these sections, it should be borne in mind that we are not dealing with provisions prescribing the mode of administering property amongst creditors generally, but with provisions prescribing the rights of particular creditors who have obtained judgments and executions.

Now, the sections alluded to, are in these terms. S. 235 :—
"Where the property shall consist of lands, houses, or other immoveable property, the attachment shall be made by a written order prohibiting the defendant from alienating the property by sale, gift, or in any other way, and all persons from receiving the same by purchase, gift, or otherwise." S. 240 says :—"After any attachment shall have been made by actual seizure, or by written order as aforesaid, and in the case of an attachment by written order after it shall have been duly intimated and made known in manner aforesaid, any private alienation of the property attached, whether by sale, gift, or otherwise, and any payment of the debt or debts, or dividends or shares to the defendant during the continuance of the attachment shall be null and void."

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The question is whether those words, "any private alienation of the property attached, whether by sale, gift, or otherwise, shall be null and void," are to be taken in the widest possible sense as null and void against all the world, including even the vendor, or to be taken in the comparatively limited sense attached to them by the Courts in India? Their Lordships adopt the language of the Chief Justice, who expresses his opinion that "the object was to make the sale null and void so far as it might be necessary to secure the execution of the decree; it relates only to an alienation which would affect the creditor who obtained the attachment." That appears to their Lordships to be the true meaning of the section. It could scarcely be held, in fact it was scarcely maintained in argument, that a sale made to a *bonâ fide* purchaser by the vendor could be set aside by the vendor himself; the words must, therefore, necessarily be read with some limitation. It appears to their Lordships that their construction must be limited in the manner indicated by the Chief Justice, on the ground that they were intended for the protection of the creditor who had obtained an execution, and not for the protection of all persons who at any future time might possibly obtain executions.

Reference has been made to s. 271, which is to this effect:—"If, after the claim of the person on whose application the property was attached has been satisfied in full from the proceeds of the sale, any surplus remain, such surplus shall be distributed rateably amongst any other persons who, prior to the order for such distribution, may have taken out execution of decrees against the same defendant, and not obtained satisfaction thereof." This section only applies where there has been a judicial sale, and appears to their Lordships to have little or no bearing on the question in the present case, which is, whether or not under the circumstances a private sale was valid.

Their Lordships understand that the Courts in India have generally proceeded upon the view taken by the Chief Justice and the majority of the Court, and would be unwilling to interfere with an established course of practice unless they came to a very clear opinion that it was wrong.

Under these circumstances their Lordships will humbly advise Her Majesty that the decree of the High Court should be affirmed, and this appeal dismissed with costs.

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Appeal dismissed.

Agent for appellant : Mr. Barrow..

Agent for respondents : Mr. Wilson.

ALEXANDER JOHN FORBES (PLAINTIFF) v. BABOO LUTCHMEPUT SINGH AND OTHERS (DEFENDANTS).

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Sale of Sub-tenure for Arrear of Rent—Encumbrances—Regs. VII of 1799 (1), VIII of 1819, I of 1820, and VIII of 1831 (2)—Act VIII of 1855 (3)—Act X of 1859, s. 105 (4).

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Where a sub-tenure had been granted, but no power was reserved to the grantor in the sunnud to sell the tenure free from encumbrances in case of default in payment of rent, held that, in a sale for arrears of rent under Reg. VIII of 1831, the purchaser did not take free from encumbrances created by the grantee.

The decision in *Shakabodeen v. Futeh Ali* (5) affirmed.

THIS was an appeal from a judgment passed on review by the High Court of Bengal on the 26th April 1867. Some time previous to 1793, certain talooks were granted by way of *istemrar* to one Hossein Reza and his descendants at a fixed jumma of Rs. 2,291. On the 13th March 1850, Shah Ali Reza, being then the holder of the talooks, made a conditional sale of them to one Forbes to secure re-payment of a loan. Forbes took steps to foreclose on the non-payment of the debt, and having absolutely foreclosed obtained a decree for possession on 18th December 1854.

* *Præsent* :—SIR JAMES W. COLVILLE, SIR JOSEPH NAPIER, SIR MONTAGUE SMITH, AND SIR LAWRENCE PEARL.

(1) Reg. VII of 1799, ss. 1 to 20, repealed by Act X of 1859,

(4) See Bengal Act VIII of 1869, ss. 59 to 61

(2) Reg. VIII of 1831, repealed by Act X of 1859.

(5) Case No. 992 of 1866; 13th March 1867.

(3) Act VIII of 1835, repealed by Bengal Act VIII of 1865.

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On the 6th January 1855, the zemindar of the talooks, Baboo Pertab Singh, brought a suit in the Collector's Court, under Regulation VIII of 1831, to recover rent due from the grantee of the talooks, and he also appointed persons to collect the rent direct from the cultivators so as to secure his annual jumma. In March 1855, Forbes petitioned the Judge, complaining that his decree for possession as against his mortgagor could not be executed in consequence of the zemindar's men collecting the rents; he also prayed, in a petition to the Collector, that he should be allowed to deposit with the Collector money which he had tendered to the zemindar in respect of the rent due from the date of the decree, but which had been refused; but nothing appeared to have been done under those petitions. On the 27th March 1855, Baboo Pertab Singh applied for execution of his rent-decree by the sale of the talooks, and on the 26th April, they were sold by the Collector, and bought for Rs. 1,000 by Sheikh Jowhur Ali, one of the present respondents.

On the 21st May 1855, Forbes, relying on his decree for possession, applied to the Collector for mutation of his name in lieu of that of his mortgagor, but the Collector refused on the ground that the talooks had been sold for arrears of rent. The usual Act IV. of 1840 cases ensued, and resulted in Sheikh Jowhur Ali being kept in possession.

In March 1856, Forbes commenced the suit, out of which this appeal arose, against the zemindar and the purchaser at the Collector's sale. In his plaint he contended that, previous to the sale by the zemindar, the foreclosure proceedings being complete, Shah Ali Reza had no further interest in the talook, and that he, Forbes, should be recognised as talookdar. The defendants contended that, inasmuch as the grantee through whom the plaintiff claimed had made default in payment of rent, and, while he was in possession of the premises, these premises had been sold by the Collector for such arrears, all sub-tenures, or mortgages, created by him fell to the ground, and that therefore the plaintiff had no right. Before the case was decided, Forbes' decree against the mortgagor for possession was reversed on appeal by the Sudder Court, and accounts were ordered to be taken. The effect of this reversal being to destroy Forbes' possessory title, the Prin-

cipal Sudder Ameen dismissed his suit against the zemindar and Sheikh Jowhur Ali.

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Against this decree he appealed to the High Court ; but in the mean time the Sudder Court having on review dismissed his possessory suit by decree of 21st April 1862, his right to conduct the present suit was held by the High Court on the 12th March 1863 to have determined.

In February 1866, Her Majesty in Council reversed the decree of the Sudder Court of 21st April 1862, whereupon Forbes applied to the High Court for a review of the decision of the 12th March 1863 ; and the review having been admitted and argued, the High Court, on the 26th April 1867, rejected the review and dismissed the plaintiff's suit (1), the effect of the decision being to pass the whole tenure to Sheikh Jowhur Ali under his purchase at the Collector's sale.

Forbes appealed against that decision to Her Majesty in Council.

Sir *R. Palmer*, Q.C., and Mr. *Leith* for the appellant.—There appears to have been some misapprehension as to the terms of the sunnuds under which Shah Ali Reza held ; the High Court state in their judgment that, “ by the terms of the sunnud or lease, it is not the rights and interests, but the tenure itself which passes, if the arrears due upon it, including Government revenue undertaken to be paid as part of the rent, should not be paid : ” if this is erroneous, the whole principal of the judgment is erroneous, and the decision of *Shahaboodeen v. Futteh Ali* (2) must govern this case.

The sunnuds are not in the record, but we are informed that they are precisely the same as those in the record of the appeal suit between the present appellant and Shah Ali Reza's widow, *Forbes v. Ameeroonissa Begum* (3) ; and if this be so, it will be found that no such terms exist in the sunnud.

(1) Act IV of 1840, repealed by Act XVII of 1862 ; see Ch. XXII of the old Criminal Procedure Code (Act XXV of 1861) and Ch. XL of the new Code (Act X of 1872.)

(2) Case No. 992 of 1866; 13th March 1867.

(3) 10 Moo. I. A., 240.

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The learned Counsel then proceeded to consider the Regulations as supporting the decision of the Full Bench in the case of *Shahaboodeen v. Futteh Ali* (1), and they also referred to *Tirthanund Thakoor v. Paresmon Jha* (2) and *Mohesh Chunder Banerjee v. Chunder Monee Debee* (3).

(1) Case No. 992 of 1866; 13th March 1867.

(2) *Before Mr. Justice Lock and Justice Sir C. P. Hobhouse, Bart.*

TIRTHANUND THAKOOR AND
 OTHERS (PLAINTIFFS) v. PARES-
 MON JHA AND ANOTHER (RES-
 PONDENTS).*

Baboo *Tarrucknath Sen* for the appellants.

Baboo *Khettermohon Mookerjee* for the respondents.

HOBHOUSE, J.—This is a suit rather of a peculiar nature, and it is necessary to state carefully the facts on which we have to come to a decision on the point of law before us.

The plaintiff in this suit held a decree against one of the defendants, Rung Lall, in the Revenue Court for arrears of rent for the year 1273 and 1274. This decree was dated the 10th September 1867. The co-defendant of Rung Lall, namely, Paresmon Jha, held a money-decree in the Moonsiff's Court against the said Rung Lall, dated the 28th May 1867. In execution of this money-decree, the defendant Paresmon Jha put up for sale the rights and interests of Rung Lall in the tenure, which is the subject of dispute before us; and on the 29th November 1867, the said Paresmon Jha became the purchaser of the said rights and interests in the said tenure. Thereafter, on what date we are not shown, the plaintiff prayed in the Revenue Court for execution of his decree for arrears of rent of the 10th September 1867 by the sale of the said tenure of Rung Lall.

The arrears of rent for which the decree was given were admittedly arrears due from the defendant, Rung Lall, as the tenant of the tenure which was sold to the defendant Paresmon.

When the plaintiff applied for execution of his decree in the manner I have said, the Deputy Collector, on the 25th April 1868, refused to allow such execution to proceed on the ground that whatever had been Rung Lall's rights and interests in the tenure had been sold to the defendant Paresmon at the previous sale by the Civil Court.

Under these circumstances, the plaintiff sues for the reversal of the sale made by the Civil Court on the 29th November 1867, and for the cancellation of the order of the Deputy Collector of the 25th April 1868, and to obtain sale of the tenure in question.

The lower Appellate Court has dismissed the plaintiff's suit on the ground that the sale to the defendant of the 29th November 1867 was a good sale, and that there cannot, therefore, be any re-sale of the rights and interests of the judgment-debtor Rung Lall in the tenure in question.

In special appeal it is contended that this judgment is erroneous in law, and the argument of the plender for the special appellant is this:—He says that inasmuch as the defendant Rung Lall was the tenant of the under-tenure in question, and that inasmuch as the arrears of rent for which the decree was given to the plaintiff were arrears of rent due by the tenant of this particular tenure, so

(3) *Post*, p. 150.

* Special Appeal, No. 2997 of 1869, from a decree of the Subordinate Judge of Purneah, dated the 17th September 1869, affirming a decree of the Moonsiff of that district, dated the 27th May 1869.

Mr. Field, Q. C., and Mr. Doyne for the respondent, Sheikh Jowhur Ali.—The cases last cited are decided upon the con-

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the tenure itself was liable for the amount of the said arrears, and the defendant Paresmon, who bought that tenure bought it subject to such liability.

In the first place, it is quite clear to me that the two first prayers contained in the suit could not, under any circumstance, be granted. It is not for a moment contended that the decree of Paresmon in the Moonsiff's Court, that the sale to Paresmon in that Court, or that the order of the Deputy Collector of the 25th April 1863, are in any way tainted with fraud. It must, therefore, be held at once that the sale of the 29th November, whatever it may have conveyed to the purchaser, was, for what it was worth, a good sale; and also that the order of the Deputy Collector refusing to allow any re-sale of the tenure was an order passed with jurisdiction, and was an order, therefore, which we cannot in the Civil Court set aside. But I do not propose to base my judgment upon such a narrow basis as that the two principal prayers of the plaintiff cannot be complied with, and that, therefore, the suit must be dismissed. I will rather take it that the suit is of this nature,—that it is a suit to have it declared that the tenure purchased by Paresmon on the 29th November 1867, is a tenure which, notwithstanding his purchase, is liable for the arrears of rent decreed due from the former tenant of the tenure, and is therefore liable to be sold for the amount of those arrears.

Now, the whole of this contention rests upon this theory, namely, that every under-tenure is hypothecated to the proprietor of the same for the rent derivable and due from such under-tenure. Now, although there is a law, s. 112 Act X of 1859, which declares that the produce of the land is held to be hypothecated for the rent payable in respect thereof, yet

there is no law shown to us which has declared that the land itself is held to be hypothecated for the rent thereof. It seems to me, therefore, in the first place that the mere fact that there is a law declaratory that the produce of the land is held hypothecated for the rent, is strong evidence to show that there is no law by which the land itself is held to be hypothecated for the same purpose; the *expressio unius* is the *exclusio contrarii*.

But we are shown certain decisions of some Division Benches of this Court which are said to be in accordance with the special appellant's view upon this case—namely, *Khoobaree Rai v. Roghobur Rai* (a), *Gopal Mundul v. Soobhudra Boistobee* (b), *Mussamut Sufuroonissa v. Saree Dhoopee* (c), *Doorga Persad Bose v. Sreckisto Moonsee* (d), *Maharajah Satish Chunder Roy Bahadoor v. Modheosoodun Paul Chowdhry* (e).

Now, the most cursory glance at the cases to be found in Wyman makes it quite clear that the point before us was not in any shape brought before the minds of the Judges who decided the cases there reported, and in fact the pleader for the special appellant very candidly admits that that is so: and the most that he can make out of those reported cases is that there are some expressions in them which seem to favor his views.

Again, I think that from a careful consideration of the cases of *Gopal Mundul v. Soobhudra Boistobee* (b) and *Mussamut Sufuroonissa v. Saree Dhoopees* (c), it will appear that they were not cases in which the point before us was really the point which the Judges there decided. In *Mussamut Sufuroonissa v. Saree Dhoopees* (c), the Judges held that the suit turned upon fraud or no fraud, that the Judge below had found fraud

(a) 2 W. R., 131.

(b) 5 W. R., 250.

(c) 8 W. R., 384.

(d) 2 Wyman's Revenue, &c., Journal, p. 212.

(e) 3 *Id.*, p. 19.

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struction of Act X of 1859, but this has to be decided upon Regulation VII of 1799.

If the sunnuds are expressly in the words of those referred to by the Counsel for the appellant, no doubt the High Court were

without any evidence thereof, and that, therefore, his decision was erroneous. And so in *Gopal Mundul v. Soobhudra Boistobee* (a), the point before the Judges there again was fraud or no fraud; and although undoubtedly the learned Judges here expressed an opinion which is in favor of the special appellants' views, yet in so many terms they do not give judgment as the result of that opinion; but, on the contrary, they remand the case for trial upon the question of fraud or no fraud.

The only case which seems to be at all strong in favor of the special appellants' view is that of *Khoobaree Rai v. Boghoobur Rai* (b); and there the Judges do undoubtedly seem to say that because the rent was due upon the tenure sold, therefore, the person who bought that tenure was bound by the second sale of it. But in the same breath they say that he was so bound because of his negligence in not paying up the rents that were due upon the tenure. To make that case, therefore, applicable to the case before us, we ought to have been shown what was the date of the decree. If the decree was given after the purchaser in the Civil Court had become the proprietor of the tenure, then he might, perhaps, have been liable for the rents due upon the tenure, and when he neglected to pay them, the tenure would rightly have been sold. But the learned Judges do not state in their judgment what was the date of the decision, and we, therefore, really do not know whether that case is in point or not.

On the other hand, as I have said before, we are not shown any custom, nor any statute law, declaring that an under-

tenure is hypothecated for the rents due upon it, and there is a statute law which seems to declare by the expression of one thing that the other is not law. And the cases of *Samiraddi Khalifa v. Harischundra* (c) and *Pran Bandhu Sirkar v. Sarbasundari Dabi* (d) are distinctly in point, and by them it is expressly declared that, under circumstances exactly similar to the present, the sale made in execution of a decree of a Civil Court is good so as to prevent any second sale of the same property in execution of a decree for arrears of rent against the former tenant of that property.

I think, therefore, that the Judge was right in saying that the plaintiffs' suit must be dismissed, and I would dismiss this appeal with costs.

LOCH, J.—I concur in the judgment pronounced by my colleague. I wish to add a few words with regard to the judgment in *Mussamut Sufurounissa v. Saree Dhoopees* (e). That was a judgment pronounced by Mitter, J., in which I concurred, and it has been quoted in support of the case of the special appellant before us; and it has been urged that the opinion expressed by Mitter, J. in the judgment in *Samiraddi Khalifa v. Harischandra* (c), is opposed to the judgment he gave in that case. Looking, however, at the facts that were put before us in the case of *Khoobaree Rai v. Boghoobur Rai* (b) and the grounds upon which the special appellant came before us, it appears to me that in that judgment there is nothing inconsistent with what was said by my colleague, Mitter, J., in the case of *Samiraddi Khalifa v. Harischandra* (c): because in the former case,

(a) 5 W. R., 206.

(b) 2 W. R., 131.

(c) 3 B. L. R. A. C., 49.

(d) 3 B. L. R., A. C., 52.

(e) 8 W. R., 384.

in error, if their judgment is to be read as assuming that the tenure was made saleable by the special terms of the sunnud. The fact, however, as to the identity cannot, at present, be ascertained. It is necessary, however, to test whether,—considering that the rent was in arrear, that Shah Ali Reza's name was still on the register, and that his heirs were in possession at the time of the institution of the summary suit, and as there was no tender by the appellant of the amount of arrears claimed in the suit against the heirs,—the Regulations would authorise a sale of the tenure, so as to enable the purchaser to get possession of the land discharged from all encumbrances created by the grantee. The learned Counsel referred at length to the various Regulations previous to Regulation VIII of 1819, and submitted that, according to that Regulation, read in conjunction with Regulation I of 1820 and Act VIII of 1835, the decree of the High Court was correct.

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The other respondents did not appear.

Their LORDSHIPS delivered the following judgment :—

This is an appeal from a decree of the High Court of Calcutta on review, in effect dismissing a suit brought in the Zillah Court of Purneah in 1856 by the appellant, as mortgagee after foreclosure, to recover possession of certain talooks in Pergunnah Havalee, and to set aside a judicial sale of them made at the instance of Baboo Pertab Singh, the zemindar, under a claim for arrears of rent.

The main question in the appeal is whether the sale of the talooks made to Sheikh Jowhur Ali, the respondent, who alone appeared at the hearing, under a decree in a suit instituted by the zemindar against the heirs of Shah Ali Reza, the mortgagor, for arrears of rent, treating them as defaulting tenants, is a

the point urged before us was that the lower Appellate Court was wrong in holding that the proceedings of the zemindar were tainted with fraud and collusion, and that was the point that we were called upon to dispose of; and we held that mere loose expressions of fraud used by the lower Appellate Court were

quite insufficient to justify the Subordinate Judge in coming to the conclusion of fraud against the special appellant.

I concur in the decree proposed by my colleague in this case that the special appeal be dismissed with costs.

1872 valid sale as against the appellant, the mortgagee, who was
 FORBES not a party to that suit.

v. Ali Reza, a Mahomedan, held the property by an hereditary
 BABOO tenure created by sunnuds granted prior to 1793 to the ancestors
 LUTCHMEPUT of Ali Reza. These sunnuds are not set out in the present
 SINGH. record; but it has been certified since the argument, by the Registrar of the High Court, that they are the same as those printed in the record of the appeal in a former suit between the appellant and the representatives of Ali Reza. Their Lordships thought it right to ascertain with accuracy the contents of these sunnuds, inasmuch as the High Court based their judgment in a great degree on the assumption that the tenure was made saleable for arrears of rent by special terms contained in them. It appears from the sunnuds, thus verified, that this assumption is unfounded; and it was admitted by the learned Counsel for the respondent that, if they were the same as those set out in the former record, this was so. By the sunnuds the mouzahs are given by way of *istamar* to Hossein Reza and his descendants on a fixed and absolute jumma of Rs. 2,291.

On the 13th March 1850, the appellant advanced to Ali Reza Rs. 39,500; and to secure this advance, the latter made, in ordinary form, a conditional sale of the talooks to him, to be absolute if the money was not repaid on 13th March 1851.

It is necessary to advert shortly to the litigation which has been going on since 1851 in this and two contemporaneous suits. The mortgage-debt not having been paid, the appellant took proceedings to foreclose under Regulation XVII of 1806; and the foreclosure was completed in due course in August 1852. Thereupon, on the 28th January 1853, the appellant commenced a suit against Ali Reza to obtain possession, which was defended on grounds impeaching the validity of the foreclosure. This suit passed through all the Courts, and underwent a great variety of fortune. The Zillah Judge, on the 18th December 1854—a day material to be borne in mind—made a decree in favor of the appellant for the possession of the talooks. On appeal to the Sudder Dewanny Adawlut, the suit was remanded, when the then Zillah Judge dismissed it, and the Sudder Court affirmed his decision; but both these judgments were reversed

by Her Majesty on appeal, and the order in Council declared that the appellant was entitled to the possession of the mortgaged premises as absolute owner in the case of *Forbes v. Ameroonissa Begum* (1). The order in Council bears date on the 3rd February 1866. Shortly after the decree of the Zillah Judge of the 18th December 1854, in the appellant's suit for possession,—viz., on the 6th January 1855,—the zemindar, Pertab Singh, brought a summary suit in the Collector's Court against the heirs of Ali Reza for arrears of rent. The heirs in that suit allowed judgment to go by default, and on the 26th February 1855, an *ex-parte* decree was made against them for the amount of the arrears claimed,—viz., Rs. 712. On the 19th March 1855, the zemindar prayed that the decree might be put into execution and the talooks sold, and they were sold accordingly, on the 26th day of April 1855, to the respondent, Jowhur Ali, for Rs. 1,000. This is the sale which it is sought to set aside in the present suit. It is plain that, when this summary suit against the heirs of Ali Reza was commenced, they had no title or right whatever in the talooks. The appellant had become absolute owner, and, moreover, he had obtained the decree of the Zillah Judge for possession, which was ultimately sustained on the final appeal to Her Majesty.

On the 24th March 1856, the appellant commenced the present suit to set aside the sale and for possession against the zemindar, the purchaser Jowhur Ali, and the heirs of Ali Reza. His right to recover was at first opposed in the Courts below, on the ground that, by the judgments given in India in the first of the above-mentioned suits, his title, by foreclosure, had been invalidated; and, on this objection, decrees were made against him by the Zillah and High Courts. On the reversal of these judgments by the Queen in 1866, the appellant, in order to obtain the fruits of the long litigation, at last decided in his favor, obtained a re-hearing of his case on review; and the High Court then pronounced the judgment against him now under appeal. The contention of the appellant is that the zemindar could only sell the interest of the heirs of Ali Reza (if any), and not

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(1) 10 Moo. I. A., 340.

1872 <hr/> FORBES v. BABOO LUTCHMEPUT SINGH.	the tenure and estate which had passed to him before the decree for sale; and he also impeached the sale on the ground that it was fraudulent and collusive, and on objections founded on various alleged irregularities.
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In the view taken by their Lordships, it will only be necessary to consider the first point,—viz., the right of the zemindar to sell, under the decree in the summary suit against the heirs of Ali Reza, the tenure then vested in the appellant.

The respondent contends that the sale was by law valid. He relies on the facts that some rent was in arrear.; that Ali Reza's name was on the register, and his heirs in possession; and that the appellant did not tender the amount of the arrears. But, on the other hand, it appears that, if the heirs of Ali Reza were in possession, which is somewhat uncertain on the facts, their names were not put on the zemindar's register; and it also appears that, shortly after the commencement of the summary suit of the zemindar, and before the decree for sale, the officers of the Zillah Court, in pursuance of the decree of the 18th December 1854, gave the appellant's symbolical possession by planting bamboos, which the zemindar's agents soon afterwards pulled up; and that the appellant's agent tendered the rent for December 1854 at the entcherry of the zemindar, and that such tender was there refused, with the answer that *sazáwals* (1) had been appointed, and that until they were removed, no rent would be received. It also appears that the appellant endeavored to get his name placed on the register of the zemindar, and that before the sale he applied to the Zillah Judge for a *parwána*, directing the zemindar to place his name on the register, who refused the order. The appellant did not then apply to the zemindar, and it may be inferred that he did not do so because the above proceedings of the zemindar, who had then obtained the decree against the heirs of Ali Reza, had shown that such an application was useless. It is apparent from these facts that the zemindar had the fullest notice of the title of the appellant and of his claim to possession before the decree for sale, and that, having that notice, he proceeded, without notice to

(1) Rent Collectors.

him, to obtain a decree for sale *ex parte* against the heirs of Ali Rana. There can also be no doubt that the purchaser Jowhur Ali (who was, in fact, the Mooktear of the zemindar, and purchased at a grossly inadequate price) had in the same way notice of the appellant's title and his proceedings. It requires very plain positive law to support such a sale against the real owner under a decree thus obtained.

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The High Court, in the judgment under appeal, assume that the sunnuds, in their terms, gave the zemindar power to sell the tenure itself free from incumbrances; but, in the event of that assumption being unfounded, the learned Council for the respondent contended that the zemindar had that power, either as an incident to the tenure, or by virtue of the Regulations.

No authority was shown to satisfy their Lordships that, by any known law or usage, zemindars had the power to sell tenures of this kind for arrears of rent as a right inherent in, or incident to, the tenure, or that any such power rightfully exists, unless by special stipulation, independently of the Regulations.

A long and minute commentary was made during the argument upon the Regulations bearing on the subject from 1793 downwards, with the view, on the part of the respondent, of showing that they authorized a sale of the tenure itself, free of previous titles and incumbrances created by the defaulting tenant and his predecessors. Their Lordships do not think it necessary to discuss in detail these Regulations, because they are disposed to agree in the main with the construction put upon them in a decision of the Full High Court, which is directly opposed to this contention. The decision referred to was pronounced in an elaborate judgment of the Full Bench of the High Court (the Chief Justice, Sir Barnes Peacock, presiding), in which the Regulations are fully collated and examined—*Shahaboodeen v. Futteh Ali* (1). This, which may be regarded as the leading decision in India, has been followed by the Courts there—*Tirthanund Thakur v. Paresmon Jha* (2) and *Moresh Chunder Baner-*

(1) Case No. 992 of 1866; 13th March 1867.

(2) *Ante*, p. 142.

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jee v. Chunder Monee Debee (1). It is true that the Courts in these decisions had to construe Act X of 1859, and not Regulation VII of 1799, which had then been repealed: but powers of sale analogous to those found in the Regulation of 1799 are provided in s. 105 of Act X of 1859, with this

(1) *Before Mr. Justice Kemp and Mr. Justice Ainslie.*

MOHESH CHUNDER BANERJEE
 (ONE OF THE DEFENDANTS) v. CHUN-
 DER MONEE DEBEE AND OTHERS
 (PLAINTIFFS).*

The 27th February 1871.

Baboo *Shant Lal Mitter* and *Moh-
 endro Lal Seal* for the appellant.
 Baboo *Nil Madhab Sen* for the respon-
 dents.

The judgment of the Court was deli-
 vered by

AINSLIE, J.—This suit was remanded on the 1st of December 1862 by L. S. Jackson and Glover, JJ., with a direction to the lower Appellate Court to try the question whether the lease on which the lands had been held contained any stipulation reserving a right of sale for arrears of rent; and a further issue was also laid down regarding which nothing has been said in the present appeal.

The lower Appellate Court has now found that there was nothing in the lease which reserved a right of sale to the zemindar, and consequently holds that the tenure was sold subject to incumbrances. Against this decision, the special appellant has urged two grounds of appeal: 1st, that the *onus* of proof has been put on the wrong party; that he was called upon to produce the *kabuliat*, whereas the opposite party should have been called upon to produce the *pottah*. As in this case, the auction-purchaser, special appel-

lant, is the zemindar, he must have proofs in his own hands equal to any that can be found in the hands of the opposite party, and there was no occasion to call upon the opposite party to prove his (special appellant's) case.

The other ground is, that with reference to the decision in *Rungo monee Debia v. Raj Comaree Bibee* (a), the appellant was not bound by the decree of foreclosure passed against the former holder. It appears to us that the facts in this case are not similar to the facts of that case. Here, there was a decree of foreclosure which entirely extinguished the rights of the debtor. In that case, there was a simple decree against the debtor, making him personally responsible for a portion of the allowance due to the widow of one of the members of a joint Hindoo family in consequence of his purchase of the share of another member of the family; but it is distinctly stated in the judgment quoted that the decree did not directly affect or bind the land, but merely bound the judgment-debtor personally, and prevented him from denying his liability. We, therefore, think that the cases are not analogous, and that this issue will not affect the present case. The special appellant has also sought to argue a further objection, as to the collusiveness of the decree obtained by the opposite party; but as that point is not taken in the grounds of appeal, we decline to hear him on this ground.

We dismiss the Special appeal with costs.

* Special Appeal No. 1729 of 1870, from a decree of the Subordinate Judge of Hooghly, dated the 7th May 1870, affirming a decree of the Moonsiff of that district, dated the 16th March 1870.

(a) 6 W. R., 197.

difference that the language of the latter Act is more favorable to the contention of the respondent than that of the Regulation of 1799. The Chief Justice, in commenting on the Regulation of 1799, considered it to be clear that the power to sell the tenure itself free from incumbrances was not given by that Regulation.

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The Regulations principally relied on by the respondent are Regulation VII of 1799, s. 15, cl. 7, and regulation VIII of 1819. The part of the regulation of 1799 relied on declares that, "if the defaulter be a dependant talookdar, or the holder of any other tenure, which, by the title-deeds or established usage of the country, is transferable by sale or otherwise, it may be brought to sale by application to the Dewanny Adawlut in satisfaction of the arrears of rent." The language is not well adapted to meet the case of incumbered tenures; but the words, "if the defaulter be the holder of any tenure, it may be sold," may fairly mean that the tenure the defaulter holds, or has, such as it is in his hands, may be sold; and it does not seem to be a forced construction that the decisions above referred to have put on the statute, in holding that, if the tenure has passed to another, and is no longer in him, the alleged manner enabling it to be sold for his debt, and that if he has an incumbered tenure, then only the interest which he has in it is subject to the power of sale (*sic*). The older Regulations of 1793, 1795, and 1797 were referred to for the purpose of showing the general object to have been to give the zemindars the same powers to recover rents from their dependent talookdars, as the Government had to recover the fixed revenue from them; but these provisions relate principally to powers of distress. The recital relied on in the preamble of Regulation XXXV of 1795 (which relates to distresses), *viz.*, that justice required that proprietors should have the means of levying their rents and revenues with equal punctuality as the Government, is not found in regulation VII of 1799; and would not justify a construction of that regulation which would give, by an inference, a power of sale of so stringent a kind as that contended for. Regulation VIII of 1819, s. 11, no doubt gives an express power to sell the tenure free of all incumbrances that may have

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accrued upon it by the act of the defaulting proprietor, his representatives, or assignees ; but the power so given is confined to the case of tenures where the right of selling or bringing to sale for an arrear of rent has been specially reserved by stipulation in the engagements interchanged in the creation of the tenure. The preamble of the Act shows the existence of such tenures, and the Regulation treats them as a distinct class. It has been already pointed out that the sunnuds in this case do not contain this special power, and that the High Court was in error in so assuming.

The present case is stronger in favor of the appellant than that of *Shahabooddeen v. Futteh Ali* (1). In this case, before the zemindar took proceedings against the heirs of Ali Reza, the title of the appellant had passed beyond the stage of being an incumbrance only on the tenure. He had become the absolute owner of the tenure itself, and the heirs of Ali Reza, against whom the summary suit was brought, had no title or interest whatever left in it. They were not the holders of any tenure, to use the words of Regulation VII of 1799, and were certainly not "proprietors" in the words of the Regulation VIII of 1819.

The judgment below was also grounded on the fact that the heirs were in actual possession, and that the name of Ali Reza, their ancestor, was on the register. This was so, but they were holding possession wrongfully. Not only was their title gone, but a decree for possession had been obtained against them, and executed so far as it was possible to do so. Their possession, therefore, was in no sense lawful, and their mere *de facto* possession was known by the zemindar to be wrongful. With this knowledge the zemindar could not properly treat the heirs as holders of the tenure, so as to affect the rights of the appellant, of whose title and efforts to obtain possession he had notice.

It is true the appellant did not tender the rent which was the subject of the suit against the heirs, but, on the other hand, when he tendered the rent due from the date of his decree at

(1) Case No. 992 of 1866; 13th March 1867.

the cutocherry, the prior rent was not demanded of him, and, on the contrary, he was told the zemindar's *sazawals* were in possession, and no rent would be received. These facts, coupled with the other proceedings of the zemindar's agents, show that a further tender was useless, and therefore unnecessary, even assuming that such a tender ought to have been made to stop the proceedings in the summary suit against the heirs to which he was no party, which their Lordships are by no means prepared to affirm.

In recommending the reversal of the judgment under appeal, their Lordships in effect affirm the authority of the decision of the Full Bench in the case of *Shahaboodeen v. Futteh Ali* (1). It may be inferred from their judgment that the High Court in this case would have followed that authority, if the terms of the sunnuds had been correctly brought before them.

Their Lordships do not desire by this judgment to weaken any powers that zemindars may, by law, possess to enforce payment of their rents. What other powers and remedies the zemindar, Pertab Singh, had, and might have exercised, it is not necessary, nor is it now of any general importance, to determine, for the remedies for arrears of rent are at present mainly provided by Act X of 1859 and subsequent Acts. The only question their Lordships are called upon to decide is as to the validity of this sale, and they have come to the conclusion that, under the Regulations in force at the time, and under the circumstances of this case, this sale, for the reasons already given, was invalid.

Their Lordships think that the appellant is entitled to the mesne profits from the time of the sale to Jowhur Ali, as against him; and that in taking the account of such profits, all rent and arrears of rent due and payable to Pertab Singh and his heirs should be deducted and allowed. The appellant also claims to be entitled to a decree for mesne profits against the heirs of Pertab Singh, on the grounds (1) that the zemindar was acting in collusion with Jowhur Ali; and (2) that he persisted in the sale of the talook, when he knew that the heirs

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of Ali Reza, who alone were defendants in this suit, had no interest at all in them. Their Lordships do not think it necessary to express any opinion on the charge of collusion; but considering that the zemindar proceeded to obtain a sale of the tenure, notwithstanding he had notice of the appellant's title, and of the order made by the Zillah Court for giving him possession, and that such sale has been the means of keeping the appellant out of possession, and the cause of this suit, and that he has persistently disputed the title of the appellant, they are of opinion that the decree for mesne profits should be against the heirs of Pertab Singh, as well as against Jowhur Ali, but that executions should not be had against such heirs in respect of them until after failure to obtain satisfaction from Jowhur Ali.

Their Lordships will therefore humbly recommend to Her Majesty that the decree appealed from be reversed, and that it be declared that the sale to Jowhur Ali was invalid, and should be set aside; that the appellant is entitled to possession, and to be registered as the holder of the talooks; and that he has been so entitled since the said decree of the Zillah Court of Purneah of the 18th December 1854; and that it should also be declared that the appellant is entitled to mesne profits from the time and in manner abovementioned; and further that the respondents should pay the costs of the litigation in India; and if any costs have been paid in India, they should be refunded: and their Lordships will direct that the appellant should have the costs of this appeal.

Appeal allowed.

Agents for appellant: Messrs. *Burton, Yeates, and Hart.*

Agent for respondent, Sheikh Jowhur Ali: *Mr. Wilson.*

APPELLATE CIVIL.

Before Mr. Justice Kemp and Mr. Justice Pontifex.

JOY KOOMAR DUTTA JHA (PLAINTIFF) v. ESHAREE NUND DUTTA JHA (DEFENDANT).*

1872
Sept. 6.

Review—Act VIII of 1859, ss. 376 and 378—Order refusing to admit a Special Appeal, Power of High Court to grant a Review of—Notice.

An order refusing to admit a special appeal is open to review, and the application for review may be made without notice to the other side.

An application for the admission of a special appeal in this case was rejected on the 12th July 1871. Subsequently there was an application for a review of the order refusing to admit the special appeal, and on the 2nd December 1871, the review was granted, and the special appeal was directed to be registered.

The *Advocate-General*, offg. (Mr. Paul,) (with him Baboos Juggudanund Mookerjee and Romesh Chunder Mitter), for the respondent.

Mr. Woodroffe (with him Baboos Rashbehary Ghose and Omesh Chunder Banerjee) for the appellant.

The *Advocate-General* for the respondent, objected to the hearing of the appeal. He contended that an order refusing to entertain a special appeal cannot be reviewed; and that even if a review were allowed by law, it could not be granted without notice to the opposite side, which was not served in this case. The appeal is now improperly before the Court, and ought not to be heard, as the order admitting the appeal is wrong and without jurisdiction. S. 376 of Act VIII of 1859 only allows a review of judgment where there has been a decree of Court consequent upon such judgment, and not otherwise.

* Special Appeal, No. 265 of 1872, from a decree of the Judge of Beerbhoom, dated the 18th March 1871, affirming a decree of the Subordinate Judge of that district, dated the 26th April 1870.

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Mr. Woodroffe for the appellant.—In the matter of the Petition of Barmutollah (1), it was held that this Court could review an order (1) Before Mr. Justice Bayley and Mr. Justice Markby.

IN THE MATTER OF THE PETITION OF
BAERMUTOLLAH.

The 4th April 1872.

Mr. M. Ghose for the petitioner.

THE judgment of the Court was delivered by

MARKBY, J.—In this case an application for the admission of a special appeal was made to this Court on the 19th December last. The petition contained ten grounds of appeal; and after hearing a pleader in support of the application, it was rejected by two Judges. There is now presented to us an application for a review of the order passed rejecting the application to admit the special appeal, treating that rejection as a judgment to which Ch. xi of the Code of Civil Procedure, relating to reviews, is applicable. The application for review contains four new grounds of special appeal in addition to the ten old ones; and, if it were the first application to admit a special appeal, it would be too late.

Assuming the rejection of the application to admit a special appeal to be a judgment which may be reviewed, we think we ought still to consider whether we ought to entertain the application for review. It is not suggested that there is anything peculiar or exceptional in this case, or that there has been any new discovery since the case was last heard; or that there has been any miscarriage by the Court; or that the case put forward on the last occasion, was not correctly understood and disposed of. It is only said that "the real ground of special appeal in this case was not properly and expressly put forward on the last occasion, though it appears from the old grounds that there was some allusion to them." In short, it comes to little more than this

that the case having been once argued by a vakeel of long standing and great experience, another advocate now states that he can put the applicant's case more forcibly. I entirely admit that this Court has a discretion to admit applications for review in any case in which it considers that it is desirable for the ends of justice to do so; but I also think it has a discretion before it is called upon to hear a case re-argued, which has been already once determined, to require some explanation to be given why this exceptional course should be followed; and I think that such a statement as that which is made in this case does not amount to such an explanation as we are entitled to require. Mr. Ghose contends that we ought to hear his argument in support of the application to admit the special appeal, in order to see whether the ends of justice require that a review should be granted. But that evades the whole question. If we are bound to hear his application, in order to see whether it ought to be granted, it is obvious that every application to admit a special appeal may be made, and must be heard as many times over as the parties choose to present a petition for review, for it has been held by this Court that there is no limit to the number of applications for review. Tomorrow we may have a third advocate, who thinks he can put the case more forcibly than Mr. Ghose, the next day a fourth, who thinks he can put it more forcibly still, and so on *ad infinitum*. The power of review is a most valuable one if properly exercised, but it would be a grievous injustice to the large number of suitors who are waiting to be heard, if we were to allow parties, who have once had a fair opportunity of appearing and placing their case before the Court, to come up over and over again, in order to try and put their case better. The petitioner in this case has had three, distinct hearings in three different Courts

refusing to admit a special appeal. There can be a review of an order relating to the execution of a decree—*Hiradhun Mookerjee v. Ohunder Mohun Roy* (1). In the first case cited, this Court assumed that it could review its order, and on other grounds rejected the application. In s. 376 of Act VIII of 1859, the word "decree" is equivalent to the word "judgment." Assuming the right of review, want of notice is no defect, and cannot vitiate the proceedings. In this case there was no opposite party. The law allows an appeal against an order rejecting a plaint; could it be said that such an order cannot be reviewed because the defendant was not before the Court? If the order for the admission of a special appeal can be made without notice to the opposite party, why cannot there be a review of such order without notice also? The objection is raised too late. If the respondent felt aggrieved, he should have moved to have the appeal taken off the file. In *Bharutt Ohunder Roy v. Issur Ohunder Sircar* (2), it was held that an appeal cannot be rejected at the hearing after its admission, on the ground that it had been admitted after time.

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The *Advocate-General* in reply.—In the case of *Bharutt Ohunder Roy v. Issur Ohunder Sircar* (2), Peacock, C.J., held that the objection there alluded to could not be taken at all, not that the hearing of the appeal was not the proper time to take it. In the matter of the *Petition of Barmutollah* (3), the Court assumed the very point now raised without deciding it. That case therefore cannot be treated as an authority on this question.

The judgment of the Court was delivered by.

KEMP, J.—A preliminary objection has been made by the *Advocate-General*, who appears for the special respondent, to the hearing of this appeal. He contends, first, that an order rejecting an application for the admission of a special appeal is and I think that, in the absence of any special circumstances, we may assume that his case has been sufficiently investigated. I may add that, whilst this case has been under consideration, I have sat to hear an application for review with

L.S. Jackson, J., and he expressed in that case similar views to those which I have expressed here, in which I concurred.

(1) Marsh., 205.

(2) 8 W. R., 141.

(3) *Ante*, p. 156.

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not open to review, second, that in the present case the Court has reviewed its order without giving notice to his client.

The original application for the admission of the special appeal was filed in proper time; it was rejected on an *ex parte* hearing on the 12th of July 1871. On this Mr. Money applied to the Court to re-consider its order; and the Court, after hearing Counsel, and being satisfied that there was good and sufficient reason for so doing, on the 2nd December 1871, directed the application to be registered.

Previous to the passing of the new rules which regulate applications for the admission of a special appeal, parties could, as a matter of right, file a special appeal; and in the event of their appeal being unsuccessful, they could apply for a review, and that too more than once. The new rules do not and cannot take away this right, and we find that this Court has recognized such a right in cases where an application for the admission of a special appeal has been rejected.—*In the matter of the Petition of Barmutollah* (1).

Then it is said that, under s. 376 of Act VIII of 1859, applications for review can only be made of a decree of a Court, but it has been held by a Divisional Bench, in the case of *Cochrane v. Heera Lal Seal* (2), that this Court has power to review an order.

Lastly, it was contended by the Advocate-General that, under s. 378 of Act VIII of 1859, no review of judgment can be granted without previous notice to the opposite party to enable him to appear, and be heard in support of the decree of which a review is solicited. Now, in the case before the Court, there could be no opposite party. The first application for the admission of a special appeal was necessarily *ex parte*, as also was the second application praying the Court to re-consider its order rejecting the first application. We overrule the preliminary objection, and proceed to try the special appeal.

(1) *Ante*, p. 156.

(2) 7. W. R., 79.

[PRIVY COUNCIL.]

MUSSAMUT BAHUNS KOONWUR AND OTHERS (DEPENDANTS) v.
LALLA BUHOREE LALL AND ANOTHER (PLAINTIFFS.)

P. C.*
1872
March 2.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Act VIII of 1859, s. 260—Execution—Purchaser—Benami.

A talook in possession of a mortgagee was put up for sale under an execution against the mortgagor, and was brought by A in his own name, but *benami* for the mortgagee. A obtained a certificate as purchaser, and was put formally in possession, the mortgagee remaining in actual possession. Held (reversing the decision of the High Court) that s. 260 of Act VIII of 1859 is to be construed strictly, and that no suit would lie by A against the mortgagee to redeem.

THIS was an appeal from a decision of the High Court dated the 12th November 1868, passed in accordance with a Full Bench ruling of the 9th September 1868, whereby a decision of the Principal Sudder Ameen of Gya dated the 3rd June 1867 (1) was reversed.

In 1844, one Motee Soondery Dossee granted a *zamt-i-peshgi* lease to one Brijlal Opadhia of Talooka Doodhur, and he took and kept possession until his death, when he was succeeded in possession by his heirs the appellants. One Gungapersand having in 1861 obtained judgment against the mortgagor, his interest was sold to Lalla Buhoree Lall, who obtained a certificate under Act VIII of 1859, s. 259, on 5th October 1863. He had in fact bought *benami* for Brijlal. In March 1866, formal possession of the talook was given by the Principal Sudder Ameen to Lalla Buhoree Lall as purchaser under the decree; Brijlal's heirs however retaining real possession.

On the 5th October 1866, Buhoree Lall claiming as real owner brought the present suit against the heirs of Brijlal to redeem on the ground that the profits received had paid off the

* Present :—THE RIGHT HON'BLE SIR JAMES W. COLVILLE, SIR MONTAGUE SMITH,
SIR ROBERT COLLIER, AND SIR LAWRENCE PEELE.

(1) 3 B. L. R., F. B., 15.

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mortgage. The defendants pleaded that he was *benamidar* for them, a fact determined in their favor, and the Principal Sudder Ameen held that he therefore could not sue. He appealed to the High Court, and on the 16th July 1868, that Court (Bayley and Macpherson, JJ.) held that, under s. 260, Act VIII of 1859, he being certified purchaser, they could not enquire into the *benami* transaction, and directed the usual account. A review having been applied for, the Division Bench referred the matter to a Full Bench. On the 9th September 1868, the Full Bench (Peacock, C.J., Bayley, Macpherson, and Glover, JJ., L. S. Jackson, J., dissenting) affirmed the decision (1), and a decree was passed on the 12th November 1868 in accordance with their ruling.

The heirs of the mortgagee appealed to her Majesty in Council.

Mr. *Leith* for the appellants.—Act VIII of 1859 is one of procedure only, and is not one of substantive law, and although in one particular case it provides that the title shall not be enquired into, that is, when one who has purchased *benami*, and has obtained possession, resists a suit to turn him out of possession, it is not to override the well-established principles of equity, and allow him, when seeking to avail himself of the equitable jurisdiction of the Court, to obtain a decree contrary to equity. S. 260 must be construed strictly, and it only provides for actions against the certified purchaser. There is no enactment declaring *benami* transactions to be void, and such transactions are continually recognized by this Board, as well as by the Courts in India. The suit is brought to carry out a fraud. He referred to *Shah Mukhun Lall v. Baboo Sree Kishen Singh* (2), *Sreenauth Bhattacharjee v. Ramcomul Gungopadya* (3), and *Nuwab Sidhee Nuzur Ally Khan v. Raja Ojoodheram Khan* (4). He also referred to the cases commented upon by Peacock, C.J., in his judgment.

(1) 3 B. L. R. F. B., 15.

(2) 12 Moo. I. A., 157, *sup.* 188.

(3) 10 Moo. I. A., 220.

(4) *Id.*, 540.

M. Doyle for the respondents.—The fact of the *benami* is of course only admitted for the sake of argument on this appeal, as the question as to whether that finding on fact is correct is now under appeal. The intention of the Legislature was the same in framing ss. 259 and 260 of the Civil Procedure Code, as it was in framing s. 36 of the revenue Sale Law (Act XI of 1859), the object being to quiet titles and prevent fraud by *benami* purchases under sales in execution. The concluding words of s. 259 show that the certificate is to be taken as a valid transfer, and the admission of evidence to show that it was not a valid transfer is contrary to both the letter and the spirit of the enactment. Peacock, C.J., is correct in showing that, if such evidence were admitted, effect could not be given to the express provisions of other sections, and especially ss. 261, 263, and 264. The great object of ss. 259 and 260 is to prevent any enquiry as to a purchase being *benami*, and it would be wholly inconsistent with s. 260 if the defence of *benami*, could be set up in answer to a claim by a purchaser. If this appeal be allowed, a purchaser in whose name the certificate is made out would have the shadow, and not the substance.

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Their LORDSHIPS delivered the following judgment:—

The facts which raise the question for decision in this appeal may be very shortly stated.

Brijlal Opadhia was mortgagee in possession of Talooka Doodhur. Whilst he was so in possession, the interest of the mortgagor was offered for sale under a decree obtained against him by a creditor. Buhoree Lall became the ostensible purchaser at such sale, and the certificate of sale was granted to him in his own name as the purchaser. Brijlal Opadhia remained in possession until his death, and after it this suit was brought by Buhoree Lall against his heirs (the present appellants) for the redemption of the talook and possession of it; alleging that the mortgage-debt had been paid off by the receipt of the profits, and, if not, that he was ready to pay what might remain due. The defence was that the purchase was made by Buhoree, in his own name, as a *benami* purchaser for Brijlal Opadhia, and with his money; and that the attempt

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by Bahoree to set up title in himself was a fraud. It has been decided by the Courts in India that this defence is true in fact; and it was admitted that it must be so treated in dealing with the question to be decided in the present appeal, which is, whether, having reference to certain clauses of the Code of Procedure, the defence can in law be made available.

The point upon the construction of the Code is one of considerable difficulty, and was felt to be so by the Courts in India. The Principal Sudder Ameen decided in favor of the defendants (the appellants). His decision was reversed by a Division Bench of the High Court. However, the same Division Bench, in consequence of the doubts they entertained, upon a second hearing, referred the point by a short memorandum to the Full Bench, who gave judgment for the respondents, Jackson, J., dissenting from the decision.

It must be observed at the outset that the suit to be dealt with which is one in which the plaintiffs (the present respondents) seek to establish a right against the defendants (the appellants), and that they invoke the aid of the Courts to give effect against equity and good conscience to a claim founded upon fraud. It must be conceded that it is only by force of positive statutory law that it can be obligatory upon the Courts to give their active assistance in such a case to the fraudulent plaintiffs against the defrauded defendants. But it is said that this obligation is found in the Code of Civil Procedure. It is well known that *benami* purchases are common in India, and that effect is given to them by the Courts according to the real intention of the parties. The Legislature has not, by any general measure, declared such transactions to be illegal; and therefore they must still be recognized, and effect given to them by the Courts, except so far as positive enactment stands in the way, and directs a contrary course.

The enactments relied on by the plaintiffs are found in a Code professing to deal, not with rights, but with remedies, and procedure to enforce rights. The preamble states the object of the Code to be "to simplify the procedure of the Courts of Civil Judicature." It is right to bear this object in mind in construing the clauses on which the plaintiffs rely.

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The only express enactment on the subject occurs in s. 260. That clause, after directing that the certificate shall state the name of the person who is declared at the sale to be the actual purchaser, says this:—"And any suit brought against the certified purchaser on the ground that the purchase was made on behalf of another person, not the certified purchaser, though by agreement the name of the purchaser was used, shall be dismissed with costs." This enactment is clear and definite; there is nothing from which it can be inferred that more is meant than is expressed. It is confined to a suit brought against the certified purchaser, and to a specific direction as to what shall be done with that suit, viz., that it shall be dismissed with costs. The present suit, which is the converse of that pointed at in the clause, is not within the words or scope of it, and if dealt with in the manner directed, would, of course, come to a disastrous end. It has, however, been contended, in support of the opinion of the majority of the Judges of the High Court, that there may be inferred from this clause, taken in connexion with s. 259, and the sections relating to the manner of giving possession, a general intention, having for its object to prevent any inquiry between the purchaser *de facto* and the person for whom he is alleged to have purchased, upon the question, whether the purchase was *benámi* or not, and that effect should be given to that general intention. Their Lordships consider it would not be safe to make such an inference except it arose upon very clear implication, and that it would be especially unsafe so to construe the Act as by inference to import into it prohibitory enactments, which would exclude an inquiry into the truth in any suit between the parties, when the express enactment is narrowed and confined to a specific direction as to what shall be done in a particular suit, which is described and defined in precise terms. And it appears to their Lordships that effect can reasonably be given to the provisions of the Code without making such implication. S. 259, requiring the Court to grant a certificate to the person declared to be the purchaser at the sale, and directing that such certificate shall be taken and deemed to be a valid transfer of the debtor's right and interest, does no more than create statutory evidence of the transfer, in place of the old

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mode of transfer by bill of sale. Their Lordships consider that no inference fairly arises from this clause that it was intended to interfere with *benámi* transactions ; for the language is adapted to meet the case of ordinary purchasers, and the same language might well have been used if *benámi* transactions had been wholly unknown. The same observations apply to ss. 261 to 266, which prescribe modes of giving possession of the various kinds of property. These provisions would naturally find a place in the Act in order to govern ordinary purchases, and no inference can, therefore, be drawn from them of an intention to prohibit *benámi* transactions. It is evident from this analysis of the sections of the Code that the inference sought to be made against *benámi* transactions rests entirely on s. 260 ; and that if this clause were absent from the Code, there is absolutely nothing in the other sections from which such an inference could be drawn.

It was strongly pressed upon their Lordships that as, by the express terms of s. 260, a suit brought against a purchaser on the ground that the purchase was *benámi* must be dismissed, that it would, in many cases, lead to inconsistency, if that ground could be set up as a defence against a suit brought by a *benámidár*. If this really were so, it would result from the attempt to deal with the subject of *benámi* in a partial manner ; and even in that case their Lordships would consider it fitting that the Legislature should declare its view, and supply a remedy rather than that the Courts should strain the existing statute. But it will probably be found that the suggested inconsistencies will not be great ; and even if the respondents' view were adopted, they would not be wholly avoided. The object which the framers of the Code probably had in view, was to prevent judgment-debtors becoming secret purchasers at the judicial sales of their property ; and to empower the Court selling under a decree to give effect to its own sale, without contention on the ground of *benámi* purchase, by placing the ostensible purchaser in possession of what it had sold, and of insuring respect to that possession by enacting that any suit brought against him on the ground of *benámi* shall be dismissed. In the cases where actual possession can be given of the

thing sold by the Court, no difficulty can arise ; for there the certified purchaser, having both the certificate and possession, can hold the property by virtue of s. 260 against any suit brought against him : and if that possession should be interfered with, either by force or fraud, on the part of any person, even a *benami* claimant, it no doubt ought, without inquiry as to the *benami* claim, to be restored. It has been suggested that difficulties may arise in the case of possession given, under s. 264, of lands in the occupancy of ryots to a certified purchaser, who had bought *benami* for the judgment-debtor, to whom the ryots may have been afterwards induced to pay their rents. It was said that, upon the strict construction of the Code, the purchaser might be precluded from suing the ryots for these rents. It is not necessary to decide these questions, but their Lordships do not consider this to be a necessary consequence of the construction ; for, as regards the ryots, the certified purchaser when put into possession becomes their landlord, both by title and possession, and it may well be that they should not be allowed to set up the *benami* right of another against the person to whom they had thus become tenants. So, in the case where debts due to the judgment-debtor have been sold and delivered to the certified purchaser, the debtors may well be prevented from setting up the *benami* title of a third person in actions brought by the holder of the certificate of sale, for they are by s. 265 prohibited from praying to any one except the certified purchaser, and they could not, therefore, set up title in another. Besides, when suing them, the certified purchaser is only reducing into possession the very thing he purchased.

In fact, the instances would probably be very few where any difficulty would arise. It would occur only in cases like the present, where the certified purchaser, who is really a *benami-dar*, having been put into complete possession by the Court of the thing purchased at the judicial sale, attempts to bring a new suit against the real purchaser not to complete the title or even the possession to the thing purchased, but to enforce a right attaching to it. In this case, the purchaser has full possession

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of the thing he bought, so far as the selling Court can give it, and it cannot be taken from him ; but when he seeks, as mortgagor, in a suit altogether new, to redeem against the mortgagee in possession under his mortgage title, then the express enactment contains no words to restrain the defence set up. But difficulties would also arise from giving a wide construction to the Code, beyond the ordinary meaning of the words. It was declared by the High Court, in conformity with former decisions, that, where the real owner has been permitted to have or retain possession by the ostensible purchaser, the latter cannot insist on his certified title to recover. Now, if the Code is to be read as wholly prohibitory of *benami* judicial purchases, thus rendering them illegal, the defence in such cases ought to be disallowed ; for if allowed to be set up, then effect must necessarily be given to that which, upon the hypothesis, is prohibited and illegal. The mere permission to hold possession cannot alone give or transfer a title from the *benamidar* to the real owner. The title must depend upon the purchase having been made *benami* ; and if that be unlawful, then it ought not to be allowed to prevail in the cases in which the High Court agree that it should do so. The authorities, therefore, which have held that, in the cases just referred to, the real owner may set up his right against the *benamidar*, necessarily involve the opinion that the Code has not made *benami* purchases unlawful ; and if that is so, there seems to be no sufficient reason for giving the provisions of the Code, in cases like the present, a larger operation than the language imports. The High Court, in their judgment in this case, approve of the above authorities ; but they say they may be explained on the ground that the *benamidar* has, by consenting to the possession of the real owner, waived his right to the benefit given to him by the Code but the Code had certainly not for its object the desire to confer a benefit on fraudulent *benamidars*. Its provisions must have been framed on grounds of public policy, to which the doctrine of waiver is not properly applicable. That policy, if it was meant to be carried to the extent of making such transactions unlawful, might have been so declared

and enacted, but the Code stops short of such an enactment. Their Lordships consider that, where Legislature has stopped, the Courts must stop.

It was said that the certified purchaser, in a case like the present, would have the shadow only, and not the substance of the thing he bought, but this is exactly what in equity and good conscience he ought to have, if no positive law intervened. The question is whether such positive law does intervene in this case. For the reasons given, their Lordships do not feel justified in adopting a construction beyond what the language of the Code imports, when such a construction would, in effect, be to declare that to be unlawful which the Code itself has not declared to be so; and they are consequently of opinion that there is no bar to preclude the inquiry in this suit into the real title.

Their Lordships find that a cross-appeal to Her Majesty against the decision of the Courts below on the question of fact is pending. Without prejudice to such cross-appeal, and to any order to be made thereon, in case the same should be prosecuted, their Lordships will humbly advise Her Majesty to allow this appeal; to reverse the decrees appealed from, and in lieu thereof to order that the appeal to the High Court from the decree of the Principal Sudder Ameen be dismissed with costs. The appellants will have the costs of this appeal.

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Appeal allowed.

Agent for appellants : Mr. *Wilson*.

Agent for respondents : Mr. *Barrow*.

ORIGINAL CIVIL.

Before Mr. Justice Macpherson.

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Removal of suit from Mofussil Court—Letters Patent, 1865, cl. 13.

See also
 13B.L.R., 446. On application under the Letters Patent, 1865 cl. 13, for the removal of a suit *add* that, having regard to the whole circumstances connected with the case from the beginning the questions to be disposed of, and the conduct of the Judge before whom the proceedings were, it was proper and necessary for the purposes of justice that the suit should be removed.

On the 29th November 1872, Mr. Woodroffe, on behalf of the plaintiff, obtained a rule calling upon the Government to show cause why this suit should not be removed from the Court of the Deputy Commissioners of Hazareebaugh for trial in the High Court.

This suit was instituted by the plaintiff in *formá pauperis* through his mother and guardian, and was for the recovery of an estate in Chota Nagpore valued at Rs. 1,42,262-8. The petition for leave to sue in *formá pauperis* was filed in the Court of the Deputy Commissioner of Lohardugga, within which district the property lay, upon the 1st April 1872. It stated that, long before the British rule, Maharaja Rogonath Sahai Deo, the Rajah of Chota Nagpore (who was a sovereign prince), granted the estate in dispute for the maintenance of his brother, Thakoor Ainee Sahai, as Thakoor, according to the custom of the family, subject to an annual revenue or rent payable to the Rajah. "Such estate was to devolve on the death of Thakoor Ainee Sahai on the next Thakoor in succession, which would be his eldest son, and then to the eldest son of such succeeding Thakoor, and so on in perpetuity. If such a Thakoor die without leaving a son, the estate then would devolve upon his next brother, or his eldest son, and so on. The holder of the estate is always called the Thakoor. So that no Thakoor had any interest beyond his own life, and had no power to alienate in any

way either voluntarily or involuntarily ; in short, such estate was devoted towards maintaining the title and dignity of Thakoor." The petition then set out the succession down to the plaintiff's father, Thakoor Bishnath Sahai, who was executed on 21st April 1858 for rebellion against the British Government, and whose property was confiscated to the Government by an order dated the 16th of the same month. The plaintiff contended that the Thakoorai estate and the plaintiff's interest therein was " not affected by this order of confiscation, and that, on the death of Thakoor Bishnath Sahai, he, Bishnath, had no longer any interest therein which could pass or continue to Government under such order of confiscation, and that the Thakoorai estate and interest in the said pergunnahs passed immediately thereupon to the plaintiff according to Hindoo law and custom and usages in such cases."

On the 4th of April 1872, the Deputy Commissioner of Lohardugga wrote to the Judicial Commissioner, saying that, for certain reasons which he gave, it was not desirable that he should try the suit, and asking that it might be transferred to some other Court.

On the 12th April, in reply to that letter, the Judicial Commissioner directed the transfer of the suit from the Court of the Deputy Commissioner of Lohardugga to the Court of the Deputy Commissioner of Hazareebaugh. The record of the case was accordingly sent to the Hazareebaugh Court, but before its arrival, the Judicial Commissioner made another order, directing the Deputy Commissioner of Lohardugga in the first instance to take the case up and to decide whether or not the plaintiff should be allowed to sue as a pauper, and therefore, on the 19th of April, the Hazareebaugh Court returned the proceedings to Lohardugga. All these proceedings, subsequent to the filing of the petition for leave to sue, were taken by the judicial officers of their own motion, and without notice to the plaintiff.

On the 19th June, the Deputy Commissioner of Lohardugga admitted the plaint, giving the plaintiff leave to sue *in forma pauperis*. On the 22nd of June, the plaintiff's pleader, Mr. Stainforth, applied to the Deputy Commissioner of Lohardugga, who was likewise Collector of the district, asking him in the

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latter capacity to consent on behalf of the Government, who, as representing the Court of wards, were the defendants in the suit, to have the case transferred to the High Court for trial by it in the exercise of its extraordinary original jurisdiction ; and it appeared that, subsequently, the Deputy Commissioner of Loharduggainformed Mr. Stainforth, unofficially, that the Board of Revenue consented to the transfer. It was explained on behalf of the Government that a mistake did occur which led to a belief that the Board of Revenue had agreed to the transfer ; Mr. Beanfort, the officiating Legal Remembrancer, in an affidavit filed on behalf of the defendant, stated, "that such belief was founded upon a clerical error in a communication which issued from the Board of Revenue after the said Board of Revenue had been advised by the Legal Remembrancer not to consent to such transfer, and had been pleased to accept such advice ; and that on the discovery of the said clerical error which had been committed in the office of the said Board of Revenue, the said error was corrected." Still the fact remained that Mr. Stainforth has at first informed that the Board of Revenue had consented to the transfer, taking place.

On the 28th of June, the plaintiff's agent got formal notice that the suit had been transferred to the Hazareebaugh Court. On the 2nd of July, the Deputy Commissioner of Harzreebaugh made of formal order that the suit should be numbered and registered, and directed that notice should be served on the Government Pleader, "fixing September 2nd;" but the order did not say specially for what particular purpose the 2nd of September was fixed. Mr. Hawes, one of the pleaders for the plaintiff, stated in an affidavit that, at the time of making that order, the Deputy Commissioner said in open Court that there was no use in instituting such a suit, and that all the precedents were against him. Colonel Boddam, the Deputy Commissioner of Hazareebaugh, denied this, and accepting that denial, Macpherson, J., dismissed the matter entirely from consideration.

On the 28th of July, the Hazareebaugh Court issued a summons in the suit for service on the Government Pleader, on whom it was served next day. This summons was not produced before Macpherson, J., and there was nothing to show that

the plaintiff was wrong in asserting that the summons did not indicate what in particular was to be done in the suit on the 2nd of September.

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On the 7th of August, The Deputy Commissioner and Collector of Lohardugga wrote to the plaintiff's agent, informing him, under instructions from the Commissioner of Chota Nagpore, that the Court of Wards preferred having the case tried at Hazareebaugh, and declined to consent to the transfer to the High Court. On the 22nd of August, an application was made to the High Court for a rule to show cause why the suit should not be transferred for trial in the High Court, and a rule was granted. The application was based on an affidavit setting forth the facts above stated, and also on a variety of other matters, to which it is not necessary to allude more particularly, as the rule was subsequently discharged on the 9th of September. While the rule was pending, however, and subsequently to its being discharged, certain other matters occurred upon which, taken together with the matters which were before the Court when the former application was made, the plaintiff based the present application for the transfer of the suit. On the 2nd of September, the day named in the summons, an application was made by the Government (defendant) by petition (no one appearing for the plaintiff), asking for a month's further time to file their written statement; and the Court granted further time till the 23rd of September. Two days afterwards, the plaintiff's agent, Mr. Stainforth, filed a petition, praying that, if the defendant failed to file the written statement on the 23rd of September, the Court would proceed *ex parte* and hear the case. Notice of that application was given to the Government Pleader, who appeared upon it; and on the 6th, the Court refused the application, and by a written order of the same date expressed that the 23rd of September was fixed for the hearing.

In discharging, on September 9th, the rule that had been obtained in the High Court, Macpherson, J., indicated an opinion that it was highly desirable, under the circumstances, that the suit should not be tried in the Court of the Deputy Commissioner of Hazareebaugh; and apparently on the strength of what his Lordship said, the plaintiff, on the 20th of Sep-

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tember, made an application to a Division Court, sitting on the Appellate Side of the High Court, to have the case transferred to some other Court in Chota Nagpore. That application came on before Glover and Mitter, JJ., and being opposed by the Government was refused, the learned Judges not saying anything further than simply that the application was refused. It did not appear whether the observations made by Macpherson, J., in discharging the first rule, were brought to the notice of the learned Judges.

On the same day, the plaintiff's agent, Mr. Hawes, who had come down from Chota Nagpore to look after the proceedings in the High Court, telegraphed to Mr. Stainforth, at Ranchie, informing him that the application for transfer had been refused, and bidding him at once to go to Hazareebaugh to look after the case on the 23rd. This telegram reached Mr. Stainforth at Ranchie on the 22nd, and for reasons which were stated in a petition which he filed, Mr. Stainforth was unable to reach Hazareebaugh until the morning of the 24th. On the 23rd (being the day to which the suit had been postponed from the 2nd of September), the defendant's pleader appeared in Court, and filed his written statement. In that written statement, the defendant contended that the grant of the property in dispute to the plaintiff's ancestor, as stated by the plaintiff, was bad in law; that the effect of the order of confiscation was to vest the property in the defendant absolutely as against the descendants of the original grantee, and subject only to the payment of rent reserved to the Maharajah of Chota Nagpore; that the suit being instituted more than fourteen years after the order of confiscation was barred by the limitation prescribed by Act XXV of 1857, s. 9, and Act IX of 1859, 200, which were special laws for the suppression of rebellion, and as such must be held to override all laws, customs, and usages current in any part of the country, and that "28 Hen. VIII, c 13 (by s. 5 of which Statute all estates of inheritance were declared to be forfeited to the Crown upon any conviction high treason), must be held to have been introduced by the conditions of British rule into India, and to have been in force there in the said years 1857, and 1858, and the said Statute is one which concerns the allegiance of the subject and

his relation to the ruling power, and is suited to the preservation of the British rule in India, and is not repugnant to the habits and ideas of the inhabitants thereof." On the same day on which this written statement was filed, that is, on the 23rd of September, the suit was called on for hearing, and, under s. 114 of the Procedure Code, was dismissed for default, as no one appeared for the plaintiff, and the plaintiff was ordered to pay the defendant's costs and Rs. 1,650 for the stamp fee to Government (which he would in the first instance have had to pay if he had not been allowed to sue as a pauper).

On the 24th September, Mr. Stainforth, having reached Hazareebaugh, presented a petition, praying that the suit might be restored and heard (unders. 119 of the Code), explaining the circumstances under which he had been unable to appear in Court on the 23rd. This petition was presented in open Court, and the Government Pleader was present at the time; but the Deputy Commissioner declined to go into the matter on that occasion, and adjourned the consideration of it until the 5th of November. Notwithstanding this, the Deputy Commissioner, on the 25th of September, of his own motion, and not on any application made to him by the Government, sent a *rûbakârî* to the Collector of Lohardugga, informing him that Rs. 1,650 were due to the Government by the plaintiff for stamps, under the decree of the 23rd of September, and were to be realized from him.

On the 30th of September, the plaintiff presented a petition to the Deputy Commissioner of Lohardugga, asking that execution in respect of these Rs. 1,650 might be stayed pending the application for re-hearing, which had been adjourned to the 5th of November. That application was refused. On the 1st of October, a similar application to stay execution was made to the Deputy Commissioner of Hazareebaugh, who also refused to interfere. On the 20th of October, an unsuccessful attempt was actually made to attach the plaintiff's property. That was during the vacation, the Court being closed till the 4th of November. On the 5th of November, the Deputy Commissioner of Hazareebaugh heard the plaintiff's application for a re-hearing, and finally ordered that, on the plaintiff's paying Rs. 660-10-6 as the defendant's costs, the judgment by default passed on the

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23rd of September should be set aside, and the 5th of December be fixed for determining the issues. The plaintiff paid this sum after the 29th of November, the date on which the rule was applied for, as was stated in an affidavit filed on his behalf.

The *Advocate-General*, *offg.* (Mr. Paul), and the *Standing Counsel* (Mr. Kennedy, showed cause.

The *Standing Counsel*.—The suit is not pending, and, therefore, is not in a position to be removed under the Charter. The plaintiff applied to have it re-instated, and it was ordered that it should be re-instated on payment by the plaintiff of the defendant's costs. The rule was obtained upon an affidavit which does not state that the money has been paid, and we cannot look further. [MACPHERSON, J.—As a fact the money has been paid into Court, and there is now an affidavit to that effect. You must oppose the rule on the merits; but if you wish, I will grant a postponement to enable you to answer that affidavit.] The gravamen of the charge against Col. Boddam is his dismissal of the suit on the 23rd of September; he was justified in so doing, and it was indeed the only course open to him. The fact that the defendant's written statement was not filed till that day, does not affect the plaintiff's position, since it is unnecessary to file written statements without the express order of the Court; and in the *mofussil*, the practice is to file written statements at the first hearing. As regards the present application, it is immaterial for what purpose the 23rd of September was fixed. The plaintiff complains of the *rubākari* sent to the Lohardugga Court, but that was merely sent to the Deputy Commissioner of Lohardugga in his capacity of Collector to inform him of what had been done; it was not intended to be, and was not, in the nature of a warrant of execution; there was no certificate such as is required by s. 285 of Act VIII of 1859. [MACPHERSON, J.—The *rubākari* expressly states that the amount is to be realized from the plaintiff. It does not matter whether it was regular or not. Pending the hearing of the application to restore the suit, the Deputy Commissioner of Hazareebaugh ought to have stayed all proceedings in execution.] Even if the *rubākari* can be considered as an order in execution

when it had once passed to the Deputy Commissioner of Lohardugga, the Deputy Commissioner of Hazareebaugh had no power to recall it. [MACPHERSON, J.—Every Court which issues execution is the proper Court to regulate that execution, and has full power to recall its order even if it have passed out of its jurisdiction.] The Deputy Commissioner of Hazareebaugh may have been indiscreet, but mere indiscretion will not justify the interference of this Court. The refusal to restore the suit without payment of costs was perfectly legal and proper.

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The *Advocate-General* on the same side.—The High Court has large powers of removing suits under cl. 13 of the Letters Patent of 1865, but that power must be exercised in some way or other for the purposes of justice, *e. g.*, where the High Court sees that, owing to the difficulty of obtaining the presence of witnesses, or some such cause, the Court before which the suit was instituted cannot do justice. [MACPHERSON, J.—Your written statement shows that very difficult questions of law may arise in the case.] The defence of the statute of Hen. VIII is absurd, and we are ready to abandon it. If the Court thinks it desirable to remove this suit, the proper course would be to transfer it to another Court under the powers conferred by Act VIII of 1859.

Mr. *Woodroffe* in support of the rule.

MACPHERSON, J.—I think it is proper that, under cl. 13 of the Letters Patent, this suit should be removed, tried, and determined by this Court as a Court of extraordinary original jurisdiction; and as that section requires the High Court to record its reason for so removing a suit, I shall proceed to state in detail the reasons which induce me to make this order.

(His Lordship, after stating the facts as above, continued):—The grounds upon which the present application for a transfer is made may be said generally to be that the dismissing the plaintiff's suit upon the 23rd of September was positively illegal, inasmuch as that day had never been distinctly fixed, either for the hearing of the cause, or for the settlement of issues;

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that even supposing that it was not absolutely illegal to dismiss the suit then for default, the Court under the circumstances acted with extreme harshness and great want of discretion in so dismissing it ; that the not at once disposing of the application to restore the case under s. 119, and the postponing the consideration of the matter till the 5th of November, was also harsh in the extreme ; that the subsequently issuing execution in respect of the Rs. 1,650, while the application for restoration of the case was still pending, was not only harsh, but positively unfair to the plaintiff. The case substantially is that those later proceedings shows such a state of mind in the Judge as makes it impossible for him to deal with the case impartially and without prejudice. Mr. Woodroffe also relied on the matters on which he based his first application, and also on the defendant's written statement (filed September 23rd), which is now before the Court, and shows (it is contended by Mr. Woodroffe) that the matters in dispute are mainly questions of law which can be tried here more conveniently and better than in Hazareebaugh.

I think there is no substance in the point as to the dismissal of the suit on the 23rd of September being absolutely illegal. No doubt, under s. 41, the Court, at the time of issuing the summons, ought to have determined whether the day fixed for the defendant to appear and answer was fixed for the settlement of issues only, or for final disposal, for that section contains an express declaration that the summons shall contain a direction as to this. Still no injury was in fact done to the plaintiff by the omission : because he must have known that the 23rd of September, if fixed for anything, was fixed either for settlement of issues, or for the hearing of the cause, inasmuch as under s. 41, it could only be for one or other of those purposes that any day was fixed. There can be no doubt on the 2nd of September, the plaintiff knew perfectly well that the 23rd of September was fixed either for the settlement of issues, or for the final disposal of the suit ; and in either case, he should have been present. Practically, also, the plaintiff's agents admit that they knew that they were required to attend on that day ; for if they did not know it, how is Mr. Hawes' telegram of the 20th of September to be

accounted for, or Mr. Stainforth's anxiety to reach Hazareebaugh in time for the 23rd. Moreover, Colonel Boddam, in the written order which he made on the 6th of September, expressly speaks of the 23rd September as being fixed for the hearing. Altogether, though there was some irregularity in the procedure, I do not think there was any illegality in dealing with the case under s. 114.

But, although, I think that there was no absolute illegality in passing judgment by default against the plaintiff on that day, it does seem to me that there was a very great want of discretion and most unusual sharpness of procedure and harshness towards the plaintiff in the course adopted. The proceedings which up to the 20th were going on in the High Court were perfectly well known in Hazareebaugh; and if there had been no other reason for a little forbearance, the knowledge that, up to within a day or two previously, the plaintiff was actively prosecuting his suit, ought to have made the Court hesitate before dismissing it outright in such fashion. It was wholly unnecessary, moreover, to punish the plaintiff's default with such condign punishment, inasmuch as, if the plaintiff had been present, nothing could properly have been done on that day beyond fixing a future date for the settlement of issues. The defendant's written statement was not filed until the 23rd, and it was absolutely impossible for the plaintiff's pleaders, if they had been the most skilled lawyers in India, to have proceeded either with the hearing of the case, or with the settlement of issues without having had an opportunity of reading and carefully considering the written statement, and the various questions raised by it. The utmost that could have been done on the 23rd, had all parties been present, would have been to adjourn the case for settlement of issues, and the Court seeing the position of things, would only have acted reasonably and properly,—and I may add, would only have acted as Courts under such circumstances usually do act in the absence of special or repeated negligence on the plaintiff's part,—if it had simply adjourned the case, fixing a future day for the settlement of issues.

Again, as regards the proceedings on the 24th, it appears to

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me that the plaintiff has every reason to complain of the application for restoration not being taken up and disposed of then and there. The Court was aware of the position of the plaintiff,—was aware that the suit had been brought in his Court against the plaintiff's wish from Lohardugga,—was aware that the only person, the plaintiff had to represent him, was Mr. Stainforth, who lived in Lohardugga, and had come from there to look after the case; and yet although Mr. Stainforth was in Court, and the Government Pleader was also in Court, and the matter might have been settled in five minutes, he chooses, as he says on some suggestion that the Government Pleader wanted more formal notice, to adjourn the case to the 5th of November. The affidavit filed on behalf of the plaintiff states that the Government Pleader was present in Court, and ready and willing to have the matter disposed of at once. Whether this was or not, the notice to him was under the circumstances amply sufficient; and I have no hesitation in saying that the adjournment to the 5th of November was utterly unnecessary, and could tend to no end whatever, save putting the plaintiff to greater delay, inconvenience, and expense. But the matter does not stop there; for on the next day, the Deputy Commissioner, although he knew the circumstances in which the plaintiff was placed, and although he had fixed the 5th of November for hearing the application to restore the cause, issued a *rūbākari* to the Deputy Commissioner and Collector of Lohardugga to take out execution against the plaintiff for the Government stamp fee of Rs. 1,650. It is said that it was not an order for execution of the decree. It may not so have been a formal order for execution; but the words of the *rūbākari* are plain and clear, and they contain a direction from the Deputy Commissioner of Hazareebaugh to the Deputy Commissioner and Collector of Lohardugga to realize that amount from the plaintiff. The words of the *rūbākari* are:—
“Whereas it is necessary that the tabular statement of the suit of the pauper plaintiff be forwarded from the Deputy Commissioner to the Collector of Lohardugga for realizing the sum of Rs. 1,650 from the plaintiff, being the *ad valorem* stamp for the plaintiff, it is ordered that the tabular statement be forwarded,

together with the copy of this *rubakari* from the Deputy Commissioner to the Collector of Lohardugga," and in the tabular statement annexed, it is stated that the amount of stamp fee is Rs. 1,650, which is "to be realized from the plaintiff." That it was an order for execution, and intended as such, cannot be doubted, and accordingly we find that the Deputy Commissioner of Lohardugga did upon receipt of it proceed to put it in execution. Now I must say that, when a plaintiff whose suit has been dismissed, comes in and applies for a re-hearing under s. 119, and when the Court fixes a future day for hearing the application, instead of disposing of it at once, it does seem to me a most extraordinary and improper proceeding that the Court should, of its own motion, and without ever being called upon by any of the parties, take action and proceed to execute the decree against the plaintiff. And it is the more remarkable that such a step should have been taken in this particular case; when it is considered that the plaintiff was suing *in forma pauperis*, and that he was a minor suing through his mother and guardian. But not only did the Court direct the Collector of Lohardugga to realize the Rs. 1,650; but when application was made on the 1st of October, stating that the Court of Lohardugga was taking steps to execute the decree, and praying that execution might be stayed until the question of the re-hearing was decided, the Deputy Commissioner refused to interfere. He says now he had no jurisdiction to interfere; but, as a matter of fact and of law, he had jurisdiction; the application to stay execution was properly made to him, and it was his clear duty to have stayed execution at once.

As to what took place on the 5th of November when the application for restoration came on to be heard, there is no doubt the Deputy Commissioner had it in his discretion to order payment of costs by the plaintiff if he thought fit so to do; for under s. 119, the Court has power to put the parties on terms when granting a re-hearing. But, considering all the circumstances, there can be no doubt that the plaintiff was dealt with with great severity in this matter also.

In addition to these considerations arising out of the later conduct of the Deputy Commissioner, it is said that the case can

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be better and more properly tried here than in Hazareebaugh. On the face of the defendant's written statement, it appears that, as alleged in the affidavit filed in support of the first application made to this Court, very little evidence except of a formal description will be required, and that the suits turns mainly on questions of law; these questions being by no means simple ones.

The last paragraph of the written statement filed by the defendant, the Government, is as follows:—"The defendant is advised that the Statute 28 Hen. VIII, c. 13 (by the 5th section of which all estates of inheritance were declared to be forfeited to the Crown upon any conviction of high treason), must be held to have been introduced by the conditions of British rule into India, and to have been in force there in the years 1857 and 1858; and the said Statute is one which concerns the allegiance of the subject, and his relation to the ruling power, and is suited to the preservation of the British rule in India, and is not repugnant to the habits and ideas of the inhabitants thereof." Such a defence as this raises many questions; and although the learned Advocate-General says there is nothing in it, and he is prepared to abandon it, still as that learned gentleman will not have the conduct of the suit if it be tried in Hazareebaugh, it appears to me not unnatural that the plaintiff should think that the question is one which had better be disposed of,—especially when it is borne in mind that the defence thus pleaded on behalf of Government was approved of by the Collector of Lohardugga, the Commissioner of Chota Nagpore, and the Legal Remembrancer in Calcutta. That the written statement was approved of by these officers appears from the petition to the Collector of Lohardugga, presented in Court on the 2nd of September, which is set out in the 12th paragraph of Mr. Hawes' second affidavit. Looking at all the circumstances, and at the written statement filed on behalf of the Government, I cannot doubt that it is far better that the case should be tried by the High Court.

I do not remove the suit only on the ground that it can (by reason of the matters to be discussed) be more properly tried here; nor do I remove it only on the ground that the conduct

of the Judge renders it absolutely essential that it should be removed to this Court. But taking the whole circumstances connected with the case from the beginning, the questions to be disposed of, and the conduct of the Judge on and after the 23rd of September, I say that it is proper and necessary for the purposes of justice that the case should be removed.

The case was originally transferred, without notice to the plaintiff, from the Court where it was properly triable to the Hazareebaugh Court, to which the plaintiff afterwards took special objection. The Government at first,—accidentally perhaps, but still as a matter of fact,—the Government at first did give the plaintiff reason to suppose that the suit would be transferred, though they afterwards refused to consent to the transfer. Then, when the plaintiff applied to have the case tried in Chota Nagpore by any other Court save that of Hazareebaugh, the Government opposed the application, and got the Court to refuse it. Again on the 23rd of September, we have the dismissal outright of the plaintiff's suit, which, though not absolutely illegal, was a most unnecessary and harsh proceeding. On the 24th, there was the refusal to restore the case at once, when there was no real reason for not restoring it at once. On the 25th, the *rubakari* was issued, directing the Rs. 1,650 to be realized, which was most unfair and improper so long as the application of re-hear the case remained undisposed of; and on the 1st of October, there was the refusal by the Deputy Commissioner to stay execution when asked to do so.

In my opinion, looking at the whole course of this case from the beginning up to the present time, I think the plaintiff and his advisers may well feel considerably aggrieved, and think that the Deputy Commissioner of Hazareebaugh is in a state of mind, with reference to this case, which makes it impossible that he should be able to deal with it on the merits with impartiality or freedom from prejudice. When I find that this is so, and that the defendant's written statement raises a variety of difficult questions of law, one of them being whether the Statute 28 Hen. VIII, c. 13, applies to natives in Chota Nagpore, it seems to me that it is clearly one which it is necessary and proper for the purposes of justice should be transferred to this

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Court for trial in the exercise of its extraordinary original civil jurisdiction.

An objection was taken by Mr. Kennedy that in reality there was no suit pending at the time I issued the rule to show cause. But I have no doubt that the suit was then pending; inasmuch as, by the order of the 5th November, the Deputy Commissioner of Hazareebaugh ordered that, on the plaintiff's paying Rs. 660 for the defendant's costs, the judgment by default passed on the 23rd of September be set aside, and the 5th of December fixed for determining the issues. At the time the application was made to me, the money had not actually been paid; but the suit was so for pending that the plaintiff could at any moment up to the 5th of December pay the money, whereupon the judgment would be set aside. The suit was clearly pending when the rule was granted; and, at any rate, the money having been paid before the 5th of December, and before cause was shown, any doubt that there may have been on the matter has been set at rest.

Rule absolute.

Attorneys for the plaintiffs : Messrs. *Trotman and Co*,

Attorney for the defendant : *The Government Solicitor.*

APPELLATE CIVIL.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Ainslie.

BABOO NUND COOMAR LALL AND ANOTHER (PLAINTIFFS) v. MOUL-
VIE RAZEOODDEEN HOSSEIN AND OTHERS (DEFENDANTS).*

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BABOO NUND COOMAR LALL AND ANOTHER (PLAINTIFFS) v. SYUD
RAZAOODEEN HOSSEIN AND OTHERS (DEFENDANTS).

BABOO NUND COOMAR LALL AND ANOTHER (PLAINTIFFS) v. MOUL-
VIE ABDOL LUTIF AND OTHERS (DEFENDANTS).*

*Hindu Law—Mitakshara—Son's Property—Alienation by Father—
Obstructed Heritage.*

In execution of a decree against A, a Hindu, living under the Mitakshara, his right, title, and interest in a certain property, part of which he had acquired as heir to his nephew and cousin, was sold. A suit brought by A's sons to obtain possession of their share of property, on the ground that the debt for which the sale was held, had not been incurred under a legal necessity, was dismissed so far as it related to the part of the property which A had inherited collaterally.

According to the Mitakshara, a son cannot prevent alienation by his father of property which the latter has inherited collaterally. The restriction upon the father's power of alienation only applies to the grandfather's property.

GOPAL Roy, a Hindu, subject to the Mitakshara law, died, leaving two sons, Bundoo Sing and Dhurmlall, and possessed amongst other property of a moiety of a talook called Mehal Jehangeerpore Mangerpaul, Towjee No. 724, Mehal Jehangeerpore Munkurpaul, Towjee No. 725, and Mauza Bulwa, in pergunnah Shahpore Moneer, in the District of Patna. By an amicable arrangement, a five-annas share of the property was allotted to Bundoo Sing. Bundoo Sing died, leaving four sons, Kanthoolall, Suggeonlall, Juggeonlall, and Ramjeonlall. Suggeonlall died, leaving two sons, Lullit and Laekram. Lullit died, leaving a son, Brojo Coomar. On the death of Brojo Coomar, Laekram, as the uncle, succeeded to his property.

* Regular Appeals, Nos. 62 of 1871, and 41 and 42 of 1872, from a decree of the Subordinate Judge of Patna, dated the 30 December 1870.

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v.

MOULVIE
RAZEOOD-
DEEN HOSSEIN.BABOO NUND
COOMAR LALL

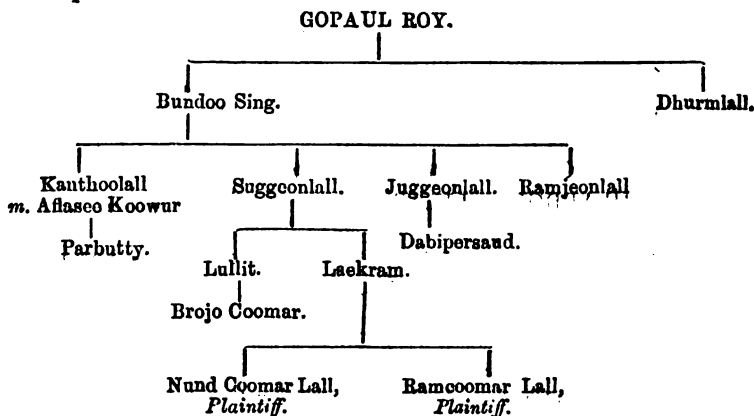
v.

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HOSSEIN.BABOO NUND
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Juggeonlall died, leaving a son, named Dabipersaud. On the death of Dabipersaud, Laekram, as his cousin succeeded to his property. Kanthoolal died, leaving a widow, Afasee Koowur, and a daughter, named Parbutty. By an amicable arrangement, Laekram obtained a nine-anna share of the property left by Kanthoolal. The following pedigree shows the relationship of the parties :—



Chowdhry Wahed Ali and Moulvie Abdool Lutif sued Laekram for Rs. 45,000 due to them on his bond dated the 22nd December 1866, and which recited that the money had been borrowed to pay a judgment-debt of one Issur Sahoy, and obtained a decree. In execution of this decree, the right and interest of Laekram in Mehal Jehangerpore Mangerpaul were sold and purchased by Syud Razaoodeen Hossein, Brijput Sahoy, and Shewput Sahoy.

Mohes Doss sued Laekram for the recovery of the amount due to him on the several bonds executed by Laekram on the 1st December 1862, 23rd May 1863, and 2nd October 1864, and obtained a decree. In execution of this decree, the right, title, and interest of Laekram in Mehal Jehangerpore Munkurpaul were sold and purchased by Lalla Hurrukh Lall, Moulvie Razaoodeen Hossein, and Moulvie Abdool Lutif.

In execution of a decree obtained by one Mukhun against Laekram, the right, title, and interest of Laekram in Mauza Bulwa were sold, and Moulvie Abdool Lutif, Lalla Hurrukh

Lall, and Moulvie Ashruff Hossein, became the purchasers thereof.

Nund Coomar Lall and Ramcoomar Lall, the sons of Laekram, instituted three suits for the recovery of their share in the three different parcels of property sold in execution of the decrees mentioned above.

In the suit for recovery of the plaintiffs' share in Mehal Jehangeerpore Munkurpaul, the plaint stated that a suit had been brought by the plaintiffs against Laekram and others in the Zillah Court of Patna, in which a decree had been passed in favor of the plaintiffs for possession of a two-thirds share of the ancestral property which devolved on Laekram; that Lalla Hurrukh Lall, Moulvie Razaoodeen Hossein, and Moulvie Abdool Lutif, the defendants, who were the purchasers of the right, title, and interest of Laekram, and in possession of the whole property, had kept the plaintiffs out of possession; that the defendants had purchased with notice of the plaintiffs' title; that there was no legal necessity to justify Laekram in contracting any debt; and that according to the Mitakshara, the plaintiffs were entitled to possession of two-thirds of the share of Mehal Jehangeerpore Munkurpaul which devolved on Laekram. The defence set up by Hurrukh Lall and his co-defendants was (*inter alia*) that the property in suit was brought to sale for a good and just debt of Mohes Doss, and the share of the plaintiffs was sold; that the property was not ancestral; and that it was acquired by, and was in the exclusive possession of, Laekram.

In the suit for possession of the plaintiffs' share in Jehangeerpore Mangerpaul, on the ground that, as the property was ancestral, they were entitled under the Mitakshara law to the share which they claimed, the plaint stated that a suit had been brought by the plaintiffs against Laekram and others in which a decree had been passed in favor of the plaintiffs for possession of a two-thirds share of the property of Laekram; that they had been kept out of possession by the defendants who were purchasers of the right, title, and interest of Laekram; that the defendants were purchasers with notice of the plaintiffs' title; that as the right, title, and interest of the plaintiffs could

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not be sold for the debt of Laekram, they prayed that they might be put in possession of their share in the property. The defence set up was that the property was sold in satisfaction of a lawful debt; that the whole of the share which devolved or Laekram was not the ancestral property of the plaintiffs; that part of it had been obtained from other parties, and consequently the plaintiffs were not entitled to obtain possession.

A similar defence was raised in the suit brought by the plaintiffs for possession of their share in Mauza Bulwa.

The three suits were heard together by the Subordinate Judge of Patna who raised (*inter alia*) the following issues:—

1st.—What was the extent of Laekram's interest in the property sold; whether the debts incurred by Laekram, for which the sale took place, had been made under legal necessities; and whether his ancestors were indebted; and, if so, whether the sale could affect the inchoate right of the plaintiffs?

2nd.—Whether any and what portion of Mangerpaul was ancestral property of Laekram? Was any portion of it acquired by himself?

He held that Laekram had obtained a new settlement of Mangerpaul in his own name, but that he had done so as the manager of the joint family; that the share which Laekram got directly from his father was to be viewed as ancestral property; and that the shares which he had obtained as inheritance from his nephew and cousin were to be considered as self-acquired property; but that the sale was for legal necessities, and consequently the plaintiffs were not entitled to the relief they sought. He accordingly dismissed the plaintiffs' suits.

The plaintiffs appealed to the High Court.

Baboos Anodapersaud Banerjee, Moheschunder Chowdry, and Romeschander Mitter for the appellants.

Mr. O. Gregory, Baboos Tarrucknath Sen and Dabendernarain Bose, and Moonshee Mahomed Yusoof for the respondents.

Baboo Anodapersad Banerjee for the appellants contended that no case had been made out which would prove the existence of any legal necessity.

The different rule under the Mitakshara as to the alienation of self-acquired property and ancestral property is clear, Mitakshara, Ch. i, s. 2. As to heritage, it is of two sorts, obstructed and unobstructed, Mitakshara, Ch. i, s. 1, v. 3. Under the Mitakshara, the right of succession is by birth alone, Ch. i, s. 1, v. 27. It is to property in general that a son acquires his right by birth, Ch. ii, s. 1, v. 3, and that right is unobstructed. There is no distinction made as to property which has descended from the grandfather, or which might have come to the father by succession to a collateral relative, Ch. i, s. 1, v. 27. Though Laekram's right to succeed to his brother's property was obstructed, yet, when the property came to the possession of Laekram, it became unobstructed heritage, [so far his sons were concerned. There are, according to the Mitakshara, two sorts of property, ancestral and self-acquired. The meaning of the word "ancestor" may be gathered from Ch. i, s. 1, 5 of the Mitakshara. The general rule is that sons have a vested interest in all property, whether acquired before or after their birth, Mitakshara, Ch. i, s. 1, v. 27. The special rule is laid down in Ch. i, s. 5, vv. 9 and 10. The right of the son is unobstructed in all property, "ancestral or paternal," Ch. i, s. 1, v. 27, with this difference that the father can sell his self-acquired property, Ch. i, s. 5, vv. 9 and 10. The property which devolved on Laekram by death of his brother lost its character of "obstructed heritage," so far as Laekram's sons were concerned. It became unobstructed heritage after his succession. The words "obstructed" and "unobstructed" have reference not only to time, but to the person who is likely to succeed. In the present case, the property was not the self-acquired property of the father, but obtained by inheritance. This does not fall within any of the modes of acquisition mentioned in Ch. i, s. 4, consequently the plaintiffs have an equal right with the father. Besides, the property in dispute was the property of the common ancestor, Bundoo Sing, and Laekram succeeded merely because he was a member of the family. This was not acquisition according to the Mitakshara.

Baboo Romeschunder Mitter (on the same side) contended that the property in dispute was not the self-acquired property

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1872 of Laekram. It was obtained by inheritance. The father is subject to the control of his sons in regard to immoveable property whether acquired by himself, or inherited from his father, or other predecessor. [COUCH, C. J.—What is the word in the original for which “predecessor” is used?] “*Pitradi*.” The explanation of the words “paternal and ancestral,” that is, *Pitradi*, in Ch. i, v. 27, and “ancestor” in Ch. i, s. 5, v. 11, is given in Ch. i, s. 1, v. 5. In Ch. i, s. 4, v. 6, all the classes of property which can be called, acquired are set out. In this verse, the author draws his conclusion. If the principle be applied to the present case, the property which came to Laekram would be ancestral property. The decision upon this point in *Jowahir Singh v. Gwyon Singh* (1) was *ultra vires*, as the question did not arise.

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Mr. Gregory, for the respondents, contended that the word “*Pitradi*” in Ch. i, s. 1, v. 27, meant ancestors beginning from the father. It cannot be said that the nephew is the ancestor of the uncle. A son does not succeed in case of collateral succession while his father is living. If it were ancestral property, the son and father would have had equal right. But the son of a deceased brother does not succeed along with his uncle to the property left by a collateral relative. The true heir is a brother, and not a brother and his sons. After partition all incidents of ancestral property are destroyed. There is no text of the Mitakshara which says that brother and brother’s sons would take together. The word “paternal” in Ch. i, s. 1, v. 5, is descriptive of one kind of property subject to partition. The modes of acquisition mentioned in s. 4 are not exhaustive. A son cannot compel his father to make a division of property which the latter had inherited from a collateral relative—*Rayadur Nallatambi Chetti v. Rayadur Mukunda Chetti* (2).

Baboo Anodapersaud Banerjee did not reply.

COUCH, C. J.—The plaintiffs in this suit are the sons of Laekram Lall, and the case in the plaint was that Laekram Lall held

(1) 4 Agra H. C. Rep., 78.

(2) 3 Mad. H. C. Rep., 455.

a share in the recently settled Mahal Jehangeerpore Munkurpaul as ancestral property, two-thirds of which share was the share of the plaintiffs, and one-third the share of their father; that in a suit brought by the plaintiffs against Laekram and others, the Zillah Judge of Patna decreed the disputed two-thirds to them, and on the 7th of May 1869, the writ for delivery of possession was issued by that Court; that subsequently on the application of the principal defendants who had purchased the right and interest of Laekram, the Judge passed an order giving possession to the principal defendants; and the plaint prayed for possession of the two-thirds and mesne profits.

The case of the principal defendants, Hurrakh Lall and others, was that the property in suit was brought to sale under a lien of a good and just debt of Mohes Doss, and the share of the plaintiffs was sold; and, further, that the property in suit had not descended from ancestors. The suit was heard by the Subordinate Judge of Patna, with two others of the same nature, and he found that the property in this suit was purchased by Laekram as manager for himself and his sons, and was to be viewed in the light of ancestral property; but holding that the sale, which was under a decree of the Court of Shahabad, was valid, he dismissed the suit with costs. In his judgment he refers to the judgment in the suit which is the subject of the appeal No. 41 of 1872, and we take that as part of the judgment in this suit. In that it appeared that of the share of 2 annas 1d. 6½c., held by Laekram, he directly inherited from his father or grandfather 12½d., and the remainder he inherited collaterally from the widows of two of his brothers and of a nephew.

Two questions were raised in the appeal: first, whether the sale of the plaintiffs' share was justified and was binding on them; secondly, whether, if it was not, the plaintiffs were entitled to a decree in respect of the property which Laekram inherited collaterally.

The plaintiffs were not parties to the suit by Mohes Doss under the decree in which the property was sold, and are not bound by it. It is therefore necessary for the defendants to show in this suit that the shares of the plaintiffs were liable to be sold under it. The money was lent by Mohes Doss on

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three bonds, dated the 1st December 1862, the 23rd of May 1863, and the 2nd of October 1864, and the only witness examined in this suit was the writer of two of them, who said that Laekram told Mohes Doss that, in order to meet expenses attending on his journey to Gya, where he was going to perform some religious ceremony, he was obliged to borrow. The first bond recites that the amount of Rs. 1,200 was borrowed on account of his personal necessity. The second and third contain similar statements. As the Subordinate Judge in his judgment in this suit appears to have introduced facts proved in the other suits, we will see what they were. The evidence is in the suit which is the subject of the appeal No. 42. The first witness for the defendant only proved that he had lent Rs. 600 to Laekram in Anghran 1276 (November and December 1869). The second, a servant of Laekram, said that Mukhun Coomar lent Laekram money under several bonds; he had borrowed money with the view to pay Government dues, liquidate Gooroopersaud's debt, Shuffee Khan's debt, and for meeting expenses of law suits. A third witness, No. 5, said that Laekram borrowed money from Khool Deep Sahoy; why, he could not tell: Laekram met legal expenses for conducting and defending law suits from his own funds and from funds borrowed; that he expended Rs. 8,000 or 9,000 on the occasion of his daughter's marriage, a daughter by his first wife; that the expenditure on the occasion of the plaintiff's marriage was small. No. 8 said Laekram borrowed several sums of money from Mukhun Coomar, in order to meet expenses attending the prosecution and defence of law-suits, and to pay Government dues; that he paid off Goorooperasaud's debt (which had been decreed), and also Shuffee Khan's, from the sums borrowed; that he borrowed Rs. 3,000 from Issur Sahoy, which debt he paid off by borrowing money from Moulvie Abdool Lutif, or Chowdhry Wahed Ally. This witness, who was mooktear of Laekram, said, on cross-examination, he did not remember what Laekram did actually with the specific sums that he borrowed from Mukhun. There was no evidence how or for what purpose the debts which were said to have been paid off with the borrowed money were contracted. The evidence is altogether insufficient to establish a case in which a mortgage

by a father of ancestral property would be binding on his sons. The judgment of the Subordinate Judge is mainly founded upon the assumption of facts of which there was no proof.

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It is therefore necessary to decide the second question, whether the plaintiffs are entitled to a decree in respect of the property which Laekram inherited collaterally. In the Mitakshara, Ch. i. s. 1, v. 3, heritage is said to be "of two sorts, unobstructed, or liable to obstruction. The wealth of the father or paternal grandfather becomes the property of his sons or of his grandsons in right of their being his sons or grandsons, and that is an inheritance not liable to obstruction. But property devolves on parents (or uncles), brothers, and the rest upon the demise of the owner, if there be no male issue; and thus the actual existence of a son and the survival of the owner are impediments to the succession; and, on their ceasing, the property devolves on the successor in right of his being uncle or brother. This is an inheritance subject to obstruction." V. 27 of the same section which was much relied upon in the argument for the appellant, where it says:—"Therefore, it is a settled point that property in the paternal or ancestral estate is by birth" must be considered to refer to inheritance not liable to obstruction; what is described in v. 3, as becoming the property of sons or grandsons in right of there being sons or grandsons. They do not by birth acquire a right in property to the succession to which by their father there is an impediment, and which he may never succeed to. V. 32 says:—"In respect of the right by birth to the estate, paternal or ancestral, we shall mention a distinction under a subsequent text." In s. 5, v. 9, it is said:—"So likewise the grandson has a right of prohibition if his unseparated father is making a donation, or a sale of effects inherited from the grandfather; but he has no right of interference if the effects were acquired by the father. On the contrary, he must acquiesce because he is dependant." And v. 10 is:—"Consequently the difference is this: although he may have a right by birth in his father's and in his grandfather's property still, since he is dependent on his father in regard to the paternal estate, and since the father has a predominant interest as it was acquired by himself, the son must acquiesce in the

1872 father's disposal of his own acquired property; but since both

BABOO NUND COOMAR LALL v. MOULVIE RAZEROOD-DEEN HOSSAIN. have indiscriminately a right in the grandfather's estate, the son has a power of interdiction if the father be dissipating the property." According to these texts the restriction upon the father's power of alienation only applies to the grandfather's property Vv. 8 and 11 of the same section confirm this, and so also does V. 5 of s. 5.

SYUD RAZA OODDEEN HOSSAIN. Doubts have been raised on this question by commentators, and the arguments on each side are stated in Colebrooke's Dig., Vol. II, Madras ed., p. 274, where the author is of opinion that the rule of equal dominion vested in father and son only applies where the property has regularly descended. The state of the question is very well stated in West and Buhler, Bk. 2, Intro. p. 19 :—"Ancestral property, as amongst descendants, comprises property transmitted in the direct male line from a common ancestor, and accretions to such property made with the aid of the inherited ancestral estate. Thus, in the case of a father, head of a family, property inherited from his father or grandfather, is ancestral property, however acquired by its previous possessors. On the other hand, property inherited by him from females, brothers, or collaterals, or directly from a great-great-grandfather, appears to be subject to the same rules as if self acquired. Ancestral property, in fact, may be said to be co-extensive with the objects of the *apratibandha daya*, or unobstructed inheritance. The view, here stated, agrees with that arrived at by Jagannatha, after a discussion of the contrary doctrines held by other lawyers. This discussion itself shows, however, that there is much to be said on both sides, and the question must be regarded as one still in controversy."

What appears to be the result of the text of the *Mitakshara* and the better opinion among commentators is supported by two decisions. In *Rayadúr Nallatambi Chetti v. Rayadúr Mukunda Chetti* (1) it was held that a suit by a son against his father to compel a division of immoveable property inherited by the latter from his paternal cousin could not be maintained. And in

(1) 3 Mad. H. C. Rep., 455.

Jomahir Singh v. Gayan Singh (1), it was held that a son cannot control his father's act in respect of a property, the succession to which is liable to obstruction; and it is only in respect of property not liable to obstruction that the wealth of the father and grandfather becomes the property of his sons or grandsons by virtue of birth.

We concur in these decisions. The decree of the Court below must be reversed as to two-thirds of $12\frac{1}{2}$ l. of the property in suit, and it must be decreed that the plaintiffs do recover two-thirds of $12\frac{1}{2}$ l. of the property claimed in the plaint, with mesne profits and costs of suit in proportion.

A similar decree will be made in the appeal No. 41 of 1872 between the same parties, where the property in suit is the mehal under the old settlement; and in appeal No. 42 of 1872 where the suit was against another purchaser.

Costs of the appeals to be borne by the parties in proportion.

Decrees modified.

ORIGINAL CIVIL.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Pontifax.

BONOMALLY NAWN v. T. CAMPBELL.

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Dec. 12 & 13.

Jurisdiction of Calcutta Small Cause Court—Act IX of 1850, s. 28—Act XXVI of 1864, s. 2—Sum added to legal claim for purpose of giving jurisdiction.

A plaintiff cannot jurisdiction to the Small Cause Court by adding to his claim sums which he could not under any circumstances be entitled to recover. *Sikhar Ghend v. Sooringmull* (2) distinguished.

CASE stated by the First and Second Judges of the Calcutta Court of Small Causes for the opinion of the High Court under Act XXVI of 1864, s. 7:—

The question which arises in this case has reference to the Court's jurisdiction.

"The provisions as to jurisdiction contained in Act IX of 1850 (the original Small Cause Court Act) are not identical

(1) 4 Agra H. C. Rep., 78.

(2) 1 Hyde, 272.

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with those contained in Act XXVI of 1864 (the Small Cause Court Extension Act)."

The case then set forth Act IX of 1850, s. 28 (1), and Act XXVI of 1864, s. 2 (2), and proceeded :—

"From those sections it will be seen that, while in claims for sums under Rs. 500 this Court has jurisdiction only in respect of the defendant dwelling, working, or carrying on business within the district of the Court, in claims for sums exceeding Rs. 500, this Court has an alternative jurisdiction, by reason merely of the cause of action having arisen within the local limits of its jurisdiction, without reference to the place where the defendant may be dwelling or working.

"The case now under reference, which on the face of it purports to be a suit for the recovery of a sum over Rs. 500, was originally tried by the First Judge of the Court, who found that the plaintiff's cause of action had arisen within the local limits of the Court's jurisdiction.

"It was however found that the plaintiff was only entitled to recover a sum considerably under Rs. 500, and that the balance of his claim had been thrown in, in order to bring his claim within the extended jurisdiction conferred by s. 2, Act XXVI of 1864, in cases where the cause of action had arisen within the local limits of the Court jurisdiction.

"The First Judge also found that the defendant was not subject to the jurisdiction of this Court on any of the grounds set forth in s. 28, Act IX of 1850, and being of opinion that the case, as being in reality a claim for less than Rs. 500, fell

(1) *Act IX of 1850, s. 28.*—"All persons shall be deemed within the jurisdiction of the Court, who dwell or carry on their business, or work for gain, within the district of the Court at the time of bringing the action, or who did so dwell or carry on their business, or work therein at the time when the cause of action arose, or within six months before the time of bringing the action for causes of action which arose within the same time."

(2) *Act XXVI of 1864, s. 2.*—"The jurisdiction of the Courts held, or to be

held, under the said Act IX of 1850, shall extend to the recovery of any debt, damage, or demand exceeding the sum of Rs. 500, but not exceeding the sum of Rs. 1,000, and to all actions in respect thereof * * * provided that the cause of action shall have arisen, or the defendant at the time of bringing the action shall dwell or carry on business or personally work for gain within the local limits of the jurisdiction of the Court."

properly within the provisions of that section, held that he had no jurisdiction to try it.

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"On a motion before two Judges for a new trial, it was contended for the plaintiff that, inasmuch as the amount which the plaintiff sued to recover was over Rs. 500, the case fell within s. 2, Act XXVI of 1864, and that the First Judge was wrong in holding that he had no jurisdiction to try it. In support of this view the case of *Sikhur Chund v. Sooringmull* (1), in which a similar question, arising under s. 12 of the Letters Patent in respect of the jurisdiction of the High Court, had to be determined, was brought to our notice.

"We were however unable to accept the view that a claim, not properly within our jurisdiction, could be brought within it by adding to it a further claim not made in good faith. We consequently rejected the application for a new trial.

"With reference to, the concluding remarks made by Wells, J., in the case referred to, in which he attributed to the High Court the power of adequately reimbursing a defendant against whom an excessive claim has been brought in bad faith, it is to be observed that, where a judgment is passed by this Court in favor of plaintiff for any part of his claim, no power is given for compensating a defendant. But as the decision cited in which Wells, J., is reported to have stated that he had the concurrence of the late Chief Justice in the view he expressed raises in our minds a doubt as to the correctness of our opinion, we have deemed it right to refer the matter for the opinion of the High Court."

The action was brought on a bond, whereby the defendant had bound himself to indemnify the plaintiff, who was the purchaser of certain mills, against any

"let, suit, trouble, eviction, ejection, interruption, or denial whatsoever, of, from, or by one Mr. C. Betts, or any other person or persons claiming any interest therein, under, or in trust for him."

The mills had been attached in execution of a decree obtained by one Jadunath Ghose against Betts; the plaintiff paid the amount claimed into Court to stay the sale, and sued Jadunath

(1) 1 Hyde, 272.

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Ghose to recover the sum so paid. He afterwards, by his attorney, wrote a letter of demand to the defendant claiming payment of Rs. 557-5 for loss and damages sustained by him in terms of the bond of indemnity, the following being the items of claim:—

Amount paid into Court to stay the sale of the mills in the suit of Jadunath Ghose v. C. Betts ...	123	4	6
Costs incurred by our client in regard to a suit against J. N. Ghose ...	175	8	3
Amount paid to the landlards, which was payable by you	144	0	0
Assessment bill from January to June ...	13	8	4
Damages sustained by our client	102	0	0

Rs. 557 5 0

The defendant did not pay the sum claimed by the plaintiff, and the latter thereupon brought the present action. The summons stated that the action was to recover Rs. 557-5 payable by the defendant to the plaintiff under the bond of indemnity, Rs. 279-12-9 of which sum was payable in respect of "moneys payable by the defendant to other parties (which) the plaintiff was compelled to pay them on the defendant's account." On the argument of the reference, before the High Court, it was agreed that the bond, the letter of demand, and the summons should be taken as part of the case stated.

Mr. Kennedy for the plaintiff contended that, even if the amount claimed were less than Rs. 500, the Small Cause Court would have jurisdiction. Act IX of 1850 provides for the jurisdiction of the Small Cause Courts s. 5 gives the local limits, s. 25 gives the jurisdiction as to amount, viz., in all suits where the debt or damage claimed, &c., is not more than Rs. 500; and s. 28 refers to the persons subject thereto. Then s. 2, Act XXVI of 1864, extends the jurisdiction as to amount, and in defining it as to persons, gives the Court a new jurisdiction, namely, where the cause of action has arisen within the local limits. But by s. 16, Act XXVI of 1864, that Act and Act IX of 1850 are to be read as one Act, as if the provisions in Act IX of 1850, not inconsistent with the provisions of Act XXVI of

1864, were thereby repealed and re-enacted. By virtue of the two Acts thus read, the Court has jurisdiction in suits where the debt or damage claimed is under Rs. 500, provided the cause of action shall have arisen within the local limits of the Court's jurisdiction. In *Lazarus v. Victor* (1), Macpherson, J., ruled the contrary, but that was an undefended case, in which the point was not fully argued, and the Court might therefore still consider the question open. [COUCH, C.J. (after consulting with Macpherson, J., observed)—We think the question as to the jurisdiction of the Small Cause Court over suits of smaller value than Rs. 500 was decided by Macpherson, J. His decision has been acted on down to the present time, and I do not think we can open the question now.] The jurisdiction must be determined by the sum claimed in the suit, and not by the sum ultimately recovered—*Shikhar Chund v. Sooringmuli* (2) *Raja Neel-monee Singh Deo v. Gordon, Stuart & Co.* (3), and *Prannath Roy Chowdry v. Ranees Surnomoyee* (4). COUCH, C.J.—The Privy Council there gave leave to appeal under the circumstances of that case. Here the Judges of the Small Cause Court seem to consider that the claim for damages was simply thrown in to give jurisdiction.] The question of good faith was not raised at the trial, nor is it directly raised on this reference. The words “thrown in to give jurisdiction” are vague. The Judges appear to have thought that they had not full power to deal with the costs, if the suit was improperly brought : s. 52, Act IX of 1850, gives them such power.

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Mr. *Apcar* for the defendant.—There is a distinction between the wording of s. 25, Act IX of 1850, and s. 2, Act XXVI of 1864. In the former the words are “all suits in which the debt or damage claimed, &c., may be brought,” whereas in the latter the words are “the jurisdiction of the Courts held or to be held under the said Act IX of 1850 shall extend to the recovery of any debt, &c.” In *Sikhar Chund v. Sooringmull* (2), Wells, J., observed that the words “sued for” used in cl. 12 of the Letters

(1) 2 Hyde, 258.

(3) 1 I J., N.. S. 356.

(2) 1 Hyde, 272.

(4) 7 Moo. I A., 553.

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Patent, 1865, pointed to something different from the amount recovered. It is clear that the plaintiff might have sued in the High Court and have recovered costs—*Duff v. Fisher* (1). [COUCH, C.J.—If this had been a *bonâ fide* demand for over Rs 500, the Small Cause Court would have had jurisdiction.] There is the finding that those items were thrown in for the express purpose of giving jurisdiction; see *Mutu v. Veerapah Chetty* (2), [COUCH, C.J.—There the damages were not claimed in the suit, and the appeal is determined by the value of the suit.] Yes, but the principle applies; they were there claimed for the purpose of giving a right appeal. The Court may have to go into evidence to see whether it has or has not jurisdiction, but it cannot proceed where it finds that it has not; see *Thompson v. Ingham* (3) and *Joseph v. Henry* (4), decided on s. 58 of 9 & 10 Vict., c. 95, which is similar to s. 25 of Act IX of 1850.

Mr. Kennedy in reply.

The judgment of the Court was delivered by

COUCH, C.J.—It is stated in the case which has been sent to us that the suit, which on the face of it purports to be a suit for the recovery of a sum over Rs. 500, was originally tried by the First Judge of the Small Cause Court, who found that the plaintiff's cause of action had arisen within the local limits of the Courts jurisdiction. It was, however, found that the plaintiff was only entitled to recover a sum considerably under Rs. 500; and that the balance of his claim had been thrown in, in order to bring his claim within the extended jurisdiction conferred by s. 2, Act XXVI of 1864: The First Judge also found that the defendant was not subject to the jurisdiction of the Court on any of the grounds set forth in s. 28, Act IX of 1850; and being of opinion that the case, as being in reality a claim for less than Rs. 500, fell pro-

(1) 8 B. L. R. App., 10.

(2) 8 *Id.*, App., 91.

(3) 1 L. M. & P., 216.

(4) *Id.*, 388.

perly within the provisions of that section, held that he had no jurisdiction to try it.

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I think taking this finding in connexion with the matters which have been brought before us, and it is agreed are to prove part of the case, viz., the summons, the particulars of the demand contained in the letter, and the bond, that this finding means that the plaintiff, in order to give jurisdiction to the Small Cause Court, claimed as damages sums which by law he could not recover—which he could not be entitled to at all—and added them to his claim for that purpose. In such a case as this, I think the Small Cause Court has not jurisdiction. The plaintiff could not give jurisdiction, merely by adding to his claim sums which he could not under any circumstances be entitled to recover. The decision of Wells, J., in the case referred to (1) is quite in accordance with this view because it is stated there that the suit “was a suit to recover Rs. 848-12 for damages from the defendants, who had failed to fulfil their contract,” and the learned Judge said that “the plaintiffs had, owing to the evidence adduced by them being defective, failed to prove that they had sustained damages to a larger amount than Rs. 75.” The case was not that they had put forward a claim for damages which they could not properly recover, but the evidence being defective, they could not succeed in getting more than Rs. 75; and the learned Judge held that in such a case the Court had jurisdiction under the words in the Letters Patent, cl. 12, “in which the debt, or damage, or value of the property sued for does not exceed Rs. 100.” There the suit was *bonâ fide* brought for a sum exceeding Rs. 100, and the jurisdiction of the Court could not be taken away because the evidence was defective. The other part of the judgment as to the suit being brought in bad faith, and the Court being able to compensate the defendant by awarding costs against the plaintiff, was extra-judicial. The Court’s having such a power does not affect its jurisdiction. Has the plaintiff in this case increased his claim by adding to it an amount which could not be included in it? If he has, he ought not to be allowed by so

(1) *Sikhur Chund v. Sooringmull*, 1 Hyde, 272.

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doing to give the Small Cause Court jurisdiction, and we must say that in such a case as that the Small Cause Court has no jurisdiction. As the plaintiff has done that, and has taken the opinion of this Court on the doubts which arose in the minds of the Judges of the Small Cause Court, we must say that Mr. Kennedy's client must pay the costs of reversing this case for the opinion of this Court.

Attorney for the plaintiff : Baboo Kallynauth Mitter.

Attorney for the defendant : Mr. Moses.

APPELLATE CIVIL.

1872
Sept. 11

Before Sir Richard Couch, Kt., Chief Justice and Mr. Justice Ainslie.

NUTHOO LALL CHOWDHRY AND OTHERS (PLAINTIFFS) v. SHOUKEE LALL AND OTHERS (DEFENDANTS).*

See I. L. R.
3 Cal 353.

Res-judicata—Act VIII of 1859, s. 2.—*Suit on Joint Bond.*

D and *B* executed a bond, by which they mortgaged certain lands as security for a loan taken by them from the plaintiffs. A suit was brought, and a decree was obtained by the plaintiffs against *D* and *B* under which they recovered a portion of the amount due on the bond. The plaintiffs now sued *S.* and others, on the ground that they were joint proprietors of the land mortgaged, that the loan was taken by *D* and *B* as managers for the use of all the parties interested and for carrying on their joint business and trade, and that therefore they were all jointly liable. *Held*, that the suit could not be maintained.

Ramnath Roy Chowdhry v. Chunder Sekhur Mohapatr (1) dissented from.

ON the 11th of Jeit 1271 Fuslee (1st June 1864), the defendants, Domun Lall and Bhawani Pershad, borrowed from the plaintiffs at Mozufferpore Rs. 20,000 on a bond, which was as follows :—

We are, Domun Lall, son of the late Chummun Lall, and Bhawani Pershad, son of the late Beharry Lall, inhabitants, proprietors, and shareholders of Mouzah Jurooah, Pergunnah Hajeeopore.

* Regular Appeal, No. 177 of 1871, from a decree of the Additional Judge of Tirhoot, dated the 19th of May 1871.

(1) 4 W. B., 50.

See also
2 All 207

Whereas, having taken a loan of company's Rs. 20,000, a moiety of which is Rs. 10,000, bearing interest at the rate of Rs. 1-4 per *monsem*, from Babco Chummun Lall Chowdhry and Baboo Nuthoo Lall Chowdhry, inhabitants and proprietors of Mouzah Sooriagunge, Chukla Naye, Pergunnah Bissaro, also proprietors and shareholders of Mouzah Cherowtha, Pergunnah Hajepore, we have appropriated the same to our own use. We therefore validly declare and give in writing that we shall pay the above amount, principal with interest, in a lump sum, in cash, on the 30 Aghun 1272 F. S. (13th December 1864), to the Chowdhrys aforesaid, and take back this deed, and we shall raise no contentions and disputes regarding the same; until payment of the said amount, principal with interest, we pledge and hypothecate our proprietary share in Mouzah Cherowtha, and 11 annas and 9 dams in Mouzah Nowada Kullan, Pergunnah Hajepore. We shall not overtly or covertly alienate or pledge the same during this period to any person; and should we do so, the same will be null and void. We therefore execute these few words as a bond, in order that the same may come of use when required.

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In February 1865 the plaintiffs sued Down Lall and Bhawani on the bond, and obtained a decree *ex parte* against Bhawani Pershad on the 5th April 1865, by which Bhawani Pershad's share of the lands mortgaged was declared to be liable for the debt. Domun Lall was exonerated from the claim, but the order exonerating Domun Lall was reversed on appeal. When the plaintiffs took out execution of their decree, they did so against all the family property, including that of Shoukee Lall and others, who were not judgment-debtors under the decree. The property of these persons was therefore released from attachment, and the plaintiffs realized a portion of their decree by the sale of Domun Lall and Bhawani Pershad's property, and the balance remained unsatisfied. The plaintiffs, on the 3rd of December 1870 brought the present suit to have the shares of Shoukee Lall and others included in their decree, and declared liable to the plaintiff's claim, on the ground that the defendants formed one joint family, that the money had been borrowed for the purposes of the family, although only in the name of two of the members of the family who were carrying on the trade and zemindaree business of the family as managers, and that the plaintiffs were unable to proceed against the

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property of the whole family without a decree of Court obtained for that purpose. The officiating Judge of Tirhoot dismissed the suit.

The plaintiffs appealed to the High Court.

Mr. *C. Gregory* for the appellants. [Couch, C. J.—Can such a suit lie? You ought to have sued all the defendants together. This is a second suit on the same bond.] The suit will lie. The plaintiffs have a very good claim in equity against all the members of this joint family; they were interested in the business which was carried on with their money. Such a suit will lie—*Ramnath Roy Chowdhry v. Chunder Sekhur Mohapattur* (1). True, the plaintiff has obtained a decree already; but by this suit he is seeking to make other persons who have had the use of his money liable to that decree. As the decree now stands, it cannot be executed except against Domun Lall and Bhawani Pershad. The others are liable to the plaintiffs in equity and good conscience, although at law they might have a good defence on the ground that it is a second action on the same bond.

Mr. *Lingham* (with him Baboos *Unoda Pershad Banerjee* and *Bomesh Chaunder Mitter*) for the respondents. No second suit can be brought on the same bond—*King v. Hoare* (2). This is a second suit on the same bond.

Mr. *C. Gregory* in reply.

The judgment of the Court was delivered by

Couch, C. J.—On the 11th of Jeit 1271 (1st June 1864), a bond was given by the defendants Domun Lall and Bhawani Pershad to the plaintiffs, the bond reciting that the parties had taken a loan of Rs. 20,000, and that they had appropriated that sum “to the use of all of us,” and then going on to say, until payment of the said amount, principal with interest, we pledge and hypothecate our own share of the property in Mouzah Cherowtha, and 11 annas and 9 dams in Mouzah Nowada Kallan. In

(1) 4 W. R., 50.

(2) 13 M. & W., 494.

the beginning of the bond, they describe themselves as proprietors and shareholders of Mouzah Jurooah. Whether that means some other mouzah or not does not appear ; probably it means the one which is afterwards mentioned in the bond.

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That was in June 1864. In February 1865, the plaintiffs instituted a suit against Domun Lall and Bhawani Pershad, the parties to the bond. In that they claimed to recover Rs. 22,250, principal with interest, by virtue of the bond. The defendants apparently did not appear, and evidence having been entered into as stated in the judgment, a decree was made in favor of the plaintiffs that they should recover the sum which they claimed from Bhawani Pershad, Domun being exonerated from the claim.

It is not, I think, without significance that, so soon after the bond was given, the plaintiffs put that construction upon it, treating it as a bond by the two only, Domun Lall and Bhawani Pershad.

It appears that the plaintiffs executed that decree, and according to the statement in the plaint in the present suit, they sold the right and interest of the two persons named in it ; still in the execution of the decree, treating it as an instrument which had pledged the shares of those two. They recovered the sum of Rs. 7,435, and now, instituting a suit on the 3rd of December 1870, they say :—" Since the decree was not against all the defendants, the whole of the mortgaged property in which second party, defendants, held a share was not put up to sale, but the fact is, that there being community of interest, the loan was taken and mortgage concluded alike by all defendants ; hence all of them are jointly liable to your petitioners, and the entire property ought to be held liable." So their case now is that this, instead of being a bond by the two and a mortgage of the shares of the two, was in reality a bond by all the members of the family jointly and a mortgage of the family property.

I will assume they might show that, although this bond purports to be made by two only of the family, the transaction really was a borrowing of money by the family through these two persons as the managers, and a pledging of the family

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property as a security for the money so borrowed. They might show that the transaction was one in which the persons whose names are in the bond, and who entered into the contract, were acting as agents for the family. But the bond must be one thing or the other; it must be either a bond by the two and a mortgage of the shares of the two only, or the joint bond of the family; it cannot be treated as two bonds. If it is only a bond by the two, the plaintiffs have no cause of action in the present suit, because they have already sued the two, and recovered a portion of the money from them, and they cannot sue other persons not bound by it; but if it is a joint bond by the members of the family, then they have already sued upon it. They have elected to sue some of the persons jointly liable, and not the others, and they have got a decree upon the bond, the cause of action being the non-payment of the money which the parties were jointly liable to pay. They now sue on the same cause of action the persons whom they might have joined in the former suit, but did not choose to do so. If there is a joint contract, not a joint and several, but a joint contract, and that is all this can be, and the party sues upon it and gets judgment, he cannot bring a fresh suit against the persons who were jointly liable, but were not included in the former suit.

Notwithstanding the authority of the case to which we have been referred, *Ramnath Roy Chowdhry v. Ohunder Sekhur Mohapattur* (1), and with every respect to the learned Judges who held apparently to the contrary, I am of opinion that, if this is to be considered as a joint bond by all the members of the family, the present action cannot be maintained. It is a second suit on the same cause of action. It is expressly prohibited by s. 2 of Act VIII of 1859, as the defendants in the first suit must, if the other defendants insist upon it, be made parties to the second, and without that I should say on principle that it cannot be maintained.

Upon the merits of the case, also, it seems to me that the plaintiffs have failed to make out what they allege in their plaint, that it was a bond by which all the members of the family were

(1) 4 W. R., 50.

bound, and that the mortgage was concluded alike by all of them. (His Lordships discussed the facts of the case and concluded,—)

It appears to me, therefore, that both on the question of law and on the merits, the plaintiff's case fails, and the appeal must be dismissed with costs.

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[PRIVY COUNCIL.]

MUSSUMAT AZEEZOONNISSA AND ANOTHER (DEFENDANTS) v. BAQUR KHAN (PLAINTIFF).

P. C.*
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Feby. 24

[On appeal from the High Court of Judicature, North-Western Provinces, Agra.]

Evidence—Execution of Document by Purdah Ladies—Agency—Burthen of Proof.

The plaintiff sought to make two purdah ladies liable on a document which he alleged had been executed by a third person as their agent. *Held* (reversing the decision of the High Court), strict proof of the agency must be given:

In this case the respondent brought his action against the appellants (who were sisters) to obtain possession of a village called Burehta. His plaint was not very intelligible, but in his deposition he stated that the ladies borrowed Rs. 8,000 from him, and executed to him a bond, whereby they mortgaged to him their village Nundsenee, which bond was registered through Mahomed Alea their attorney, and that subsequently in lieu of that bond, they executed a deed of conditional sale of the property now sought to be recovered, dated 28th March 1857, which was to become absolute on default in payment. Mahomed Alea was the husband of one of the appellants. The bond was produced and purported to be signed "in the handwriting of Mahomed Alea," and to have been registered by him as the attorney of the appellants on the oaths of two persons (who were not now called as witnesses), but no power-of-attorney was produced. The substituted document purported to be similarly

* *Present* :—THE RIGHT HON'BLE SIR JAMES COLVILLE, SIR M. SMITH,
SIR R. COLLIER, AND SIR L. PEEL.

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signed and registered. Both ladies denied the execution of either of the documents or the authority of Mahomed Alee to execute them, and the issues were as to whether the deed was theirs or not. In addition to giving his own evidence, the respondent called three witnesses, who spoke to the ladies having borrowed the money, and directed the document to be executed. He also filed a petition which had been presented by Mahomed Alee shortly after the mutiny, in which he alleged that the document now sued upon had, together with some other papers, been stolen from his house, the petition however alleging that, though the document had been executed, it had never been made over to the respondent in consequence of the money not having been paid. He also put in proceedings which he had taken in 1860 for a summary foreclosure of the property mentioned in the deed in question, and from these proceedings it appeared that both Mahomed Alee and the appellants had disputed the validity of the deed, but their objections could not be considered in that proceeding, the determination of them being matter for a regular suit. The appellants filed some documentary evidence for the purpose of showing that the respondent was a man of bad character, and they also called witnesses as to his antecedents; and one witness, Amjand Alee, the son of one of the appellants and of Mahomed Alee, while admitting that the document was signed by his father, gave evidence to show that the ladies had nothing whatsoever to do with the transaction.

The Judge of Futtehpore in giving judgment stated that no witness had been called who knew the defendants, who were proved to be purdah ladies, and that the three witnesses, who had been called, were utterly untrustworthy. After pointing out that the witnesses for the defendants had proved that they were ladies of position, having no occasion to borrow money, and stating that the evidence satisfied him that the plaintiff was a man of bad character, the Judge concluded by stating that the suit appeared to be completely false, and that whatever transactions there might have been between the plaintiff and Mahomed Alee, they could not affect the case of the defendants, there being no proof that Mahomed Alee was their agent.

On appeal to the High Court, Morgan, C.J., and Pearson, J.,

on the 19th December 1866, gave the following judgment, reversing the decree of the Court below :—

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"The plaintiff's case is that the defendants (two Mahomedan ladies) having borrowed from him through Mahomed Aleo (the husband of one of the defendants, and the brother-in-law of the other) Rs. 8,000 this loan was secured by mortgage-bond of the village Burehta, which bond is dated 28th March 1857. Foreclosure proceedings were afterwards taken, and it is not made to that appear such proceedings were irregular or defective. The present suit is to recover possession of the property from the defendants. The defendants deny that they borrowed the money, or gave the security, or authorized Mahomed Aleo to give it: the Judge was of that opinion and dismissed the suit. His judgment proceeds on the ground that the evidence failed to show the execution of the deed on the receipt of the money by the defendants. Whether the plaintiff may have had transactions with Mahomed Aleo or not, he considers it needless to inquire, there being no evidence to show any authority conferred on Mahomed Aleo to bind the defendants. The Judge who decided the case did so upon evidence which had been taken by another Judge (who died before the hearing), and this was done without objection, and therefore it may be presumed with the consent of the parties. His position, so far as any advantage may be derived by a Court of first instance from seeing and hearing the witnesses, was not superior to that of a Court of Appeal. In addition to the grounds of his judgment above noticed, he relied much on the proved bad character of the plaintiff, and his want of means to advance the money, and also on the respectability and position and wealth of the defendants. We do not mean to find that the plaintiff's case is free from doubt, but the admitted facts and some reasonable presumptions lead us to conclude that the plaintiff had at least proved a sufficient *prima facie* case, and that the defendants not having adduced such evidence in answer to it, as they might fairly be expected to do, there should be a decree against them. It may be presumed that the Registrar satisfied himself before registry of these bonds that they had been duly executed by a person duly empowered to execute them on the part of the ladies. They are purdah women, transacting business through agents. Who was their agent at the time of this transaction? It is said that the son of the defendant Ehsan Bibee and of Mahomed, was and had been the agent of the defendants for many years; but the proof of this fails, and there is evidence to show that Mahomed himself was at the time the defendants's agent. He so describes himself

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in 1858 in a petition transmitted to the Magistrate's Court, and, considering that the proceeding to which that petition related was public, and would probably be known to the defendants and to their alleged agent (the son of Mahomed Alee), there is reason to infer that the defendants knew Mahomed Alee to be acting as their agent, and authorised him to do so. The tenor of the petition leads to the inference that Mahomed Alee was thus acting as the ladies' agent, and that Amjad was in concert and communication with him.

That petition related to this and another mortgage-bond, which the petitioner said had been returned to him in consequence of the non-payment of the loans by the plaintiff. But as on the Magistrate's proclamation the plaintiff produced the bonds said to have been stolen, there seems reason to believe that Mahomed Alee was attempting to defeat any claim the plaintiff might hereafter bring on the bonds. It is clear from what then occurred that the bond now in question (a registered bond) then existed in the plaintiff's hands, and that Mahomed Alee was aware of its existence. Its existence indeed is not denied, nor that it was given by Mahomed Alee, but it is said that no money was in fact advanced, and that Mahomed Ali being in no way authorised by the defendants could not by any act of his bind them.

It is important to observe that this person (Mahomed Alee), the defendants do not venture to call, either he is not to be found, or he is at a distance (at Hyderabad) upon some pretext, and cannot be called. His absence is not in our opinion by any means accounted for satisfactorily. We think the defendants were bound, coming forward at this late stage to dispute the original transaction, to examine him or to give full explanation of their omission to do so.

That he had dealings in this matter with the plaintiff is clear, and it is reasonable to infer whatever the plaintiff's character or position, that Mahomed Alee would not have entered into negotiation for a loan of a considerable sum of money from a man who was not in a condition to advance the money; that money was advanced is at least *prima facie* probable, the bond being found in the plaintiff's possession, and the defendants and Mahomed Alee being challenged without effect to show that they, and not the plaintiff, were entitled to it; that Mahomed Alee the husband of one of the defendants, was their agent and manager at the time of those transactions, there is also evidence to show. It is for the defendants under such circumstances to show that Mahomed Alee in his proceeding was acting in fraud of them and without their authority; and further that, if he was their agent, the plaintiff, and not themselves,

are to suffer for his fraud. The Judge appears to us to have overlooked the probabilities of the case, and not to have adverted to this consideration that at least a *prima facie* case having been made out, it was incumbent on the defendants, who had taken no steps to dispute this transaction in the earlier stages, or until they were sued for recovery of possession, to explain under what circumstances the husband of one of them, and apparently the agent of both, had acted in the transactions of 1857 and 1858, so as to entitle them to claim exemption from an obligation apparently contracted on their credit.

We reverse the judgment of the lower Court, and decree the plaintiff's suit with costs and interest at Rs. six per cent."

The ladies having appealed to Her Majesty in Council, the case now came on for hearing *ex parte*.

Mr. Leith and Mr. Prichard for the appellants contended that the ladies being *purdah* ladies, the case was absolutely without proof, and they relied upon the case of *Seetul Pershad v. Mussumat Dookhin Badam Konwur* (1).

Their Lordships delivered the following judgment:—

This appeal arises out of a suit brought by the present respondent against the appellants for the recovery of the possession of a village named Burehta, under a title which was originally a mortgage title, but which may be taken to have been made absolute by foreclosure. The suit was resisted by the appellants, the then defendants, on the ground that they never executed the mortgage-deed in question. That is the substantial issue in the case; that it was executed neither by them, nor by any person duly authorised to execute it on their behalf. The Zillah Judge, who tried the case in the first instance, found that the plaintiff had wholly failed to make out his case, and dismissed the suit. The plaintiff then appealed to the High Court in Agra, and the learned Judges, who heard that appeal, reversed the decision of the Zillah Judge, and found in favor of the plaintiff; and it is against that decree that the present appeal is brought.

What was the foundation of the judgment of the High Court?

(1) 11 Moo. I A., 268.

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The learned Judges begin by saying:—"We do not mean to find that the plaintiff's case is free from doubt; but the admitted facts, and some reasonable presumptions, lead us to conclude that the plaintiff had at least proved a sufficient *prima facie* case, and that the defendants not having adduced such evidence in answer to it as they might fairly be expected to do, there should be a decree against them." Therefore, the judgment assumes that the plaintiff had made out a *prima facie* case, and that the defendants had failed to make a sufficient answer to that case.

It is, then, desirable in the first instance to consider what was the *prima facie* case, which, in the opinion of the learned Judges, had been proved. The case of the plaintiff was that, on the 22nd of January 1857, in consideration of an advance made by him to the defendants, they had executed to him a bond, hypothecating another village named Nundsenee; that finding he had not got the security which he intended to have, namely, a mortgage by conditional sale, he applied to them for further security, and that after some dispute it was agreed that the instrument upon which he sued should be given to him in substitution of the other, which was in fact, though not actually cancelled, treated as being superseded and made of no effect by the second transaction.

It appeared by the evidence, and it was not contested at the bar, that both these instruments were executed by Mahomed Alee, the husband of the appellant Ehsan Bibee, and each document appears to have been registered on the day on which it was executed, not at Cawnpore, the place where the defendants resided, and where the transaction of advance, if any advance was made, is alleged to have taken place; but in Futtehpore, the district in which the village of Burehta is situated. So far, no doubt, the plaintiff proved his case. But he failed to show that either at the time of the registration, or at any subsequent time any *moktearnamah* authorising the execution of those deeds by Mahomed Alee, as agent of the appellants, was produced or verified, or proved in any way. No mention of such an instrument is made in the endorsement of registration upon either mortgage, all that therein appears

being that Mahomed Alee was indentified, and that upon such indentification the deeds were registered.

Again, what is the account which the plaintiff gives of the advance and of the transaction? He alleges that this Mahomed Alee was not only the manager on behalf of his wife and her sister—of their property—but that he had some employment under a person described as the Rajah of Rusdharree; that, in that capacity, he wanted to obtain a loan of Rs. 16,000, to be applied in paying off a mortgage upon Mouzah Rusdharree belonging to the Rajah; that he, the plaintiff, agreed to advance Rs. 8,000. part of this money, on the security of the appellants' villages, and that the remaining Rs. 8,000 were to be advanced by one Rae Chund, a banker in Cawnpore; and that in some way or other the appellants were to have a counter-security upon Mouzah Rusdharree. There is no evidence whatever that any such transaction ever really took place, except the deposition of the plaintiff himself. None of the subscribing witnesses to the execution of the first bond, which was the only occasion on which money is alleged to have passed, were called. Two persons were called by the plaintiff, who alleged that they were creditors of the ladies. They gave a wholly different account of the transaction, representing that the ladies were account to change their residence, and to leave Cawnpore, that they owed to one of these persons Rs. 1,000, and to the other Rs. 451, and that these debts were paid out of the Rs. 8,000 advanced. Neither of them professed to have seen the ladies; and neither of them spoke to the execution of the first bond in his presence. They left it uncertain where the first bond was executed; their testimony pointing to its execution at Fnttehpore, and not at Cawnpore, where the ladies were living. Then only one of the subscribing witnesses to the second instrument was called, and he, too, did not profess to have been present at its execution, or to have seen any power-of-attorney under which it was executed; nor does his evidence fix the place of its execution; or show under what authority it was executed.

Their Lordships, therefore, considering that these ladies are purdah women, are of opinion that the High Court was in error in considering that a *prima facie* case had been made out at all.

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The witnesses differ from the plaintiff as to the nature of the transaction, they are not consistent as to the execution of the instruments, and not one of them pretends to prove the authority under which they purported to be executed. That authority was either a written authority, or if such a thing would suffice it was a verbal authority. No written authority is produced or proved. If there was a verbal authority, it lay upon the plaintiff to prove that verbal authority; and not upon the defendants to show that Mahomed Alee acted without their authority.

If, then, there has been any error in not calling Mahomed Alee, that is a fault of which the plaintiff, and not the defendants, should suffer the consequences, because it was clearly the plaintiff's business to establish the authority under which he says he took the conveyance of this village from a person purporting to be an agent on behalf of the purdah woman, who were the real owners of the village. But either falsely in order to excuse himself, or truly, he has alleged on the face of his plaint that Mahomed Alee is dead. He, therefore, cannot be heard to say that the defendants are in fault for not calling Mahomed Alee, even supposing that it lay upon them, and not upon him to call that person.

Their Lordships have not omitted to consider some documentary evidence relied upon by the plaintiff, viz., the petitions put in by Mahomed Alee in 1858, and afterwards in 1860. In 1858 Mahomed Alee seems to have either truly or untruly alleged that these instruments, though executed by him, never were really delivered to the plaintiff; that they remained with him until the advance should be actually made; and that during the disturbances consequent upon the mutiny at Cawnpore, his house had been plundered, and these and other documents had been taken away. It is perfectly clear that at that time the documents were in the hands of the plaintiff. He put in a counter-petition. The case was heard in a summary way by the Sessions Judge, who said that the parties must try their rights in a civil action and dismissed the criminal charge. That statement of Mahomed Alee was either true or false. If it were true, there is an end of the plaintiff's case. But if it were false, there is nothing whatever upon the face of the petition to connect that proceeding

with the defendants, except the mere statement of Mahomed Alee. The High Court seems to have assumed that because Mahomed Alee said he presented that petition on behalf of the defendants, it must be taken to have been presented by their authority, and that they were therefore concurring with Mahomed Alee in an attempt, upon a suggestion of that which was false, to escape from the consequences of this deed, and to get back the documents from the plaintiff. But there is really no more proof of Mahomed Alee's having acted as their agent in that case than there is of his agency in the original transaction; and therefore, the inference which the learned Judges drew from the mere presentation of the petition appears to their Lordships to be unwarranted. The same observation applies, perhaps even more strongly, to the petition put in by Mahomed Alee in 1860, as an intervenor in the foreclosure proceedings.

Therefore, taking the whole evidence produced by the plaintiff, their Lordships must dissent from the conclusion of the learned Judges of the High Court that any *prima facie* case had been made out; and they consider that the suit, being one brought against purdah women, upon a deed alleged to have been executed by them, wholly failed, inasmuch as there was no proof that the women had ever signed the deed, or that it had been ever signed by any person authorised by them; and that their Lordships, if they affirmed that judgment, would be going against the whole course of cases that have been decided in India and at this Board in respect of transactions to which purdah women are parties.

It has perhaps by anticipation been stated that even had a *prima facie* case been proved, their Lordships would not have concurred with the learned Judges in thinking that the case should be decided against the defendants because they had failed to call Mahomed Alee, (if Mahomed Alee is still in life), in order to prove either that he did not deliver this deed as he says he did not, or that he did not act in that transaction as their agent. They have given by the mouth of Amjaud Alee evidence far more satisfactory than any statement of so untrustworthy a person as Mahomed Alee, that that person was not their general manager or their manager at all, and that there is no reason to

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suppose that he acted in the transaction in question under any special authority from them.

For these reasons their Lordships are of opinion that, without relying upon the evidence that has been given of the bad character of the plaintiff, or of the fact that he is a person, as he certainly seems to have been, not likely to have had the means of making the advance which he says he made, the judgment of the Zillah Judge was correct, and they will humbly advise Her Majesty to allow this appeal, to reverse the judgment of the High Court, and in lieu thereof to direct that the appeal to that Court be dismissed, and the judgment of the Zillah Judge affirmed with costs, and that the respondent should also pay the costs of this appeal.

Appeal allowed.

Agent for appellants: Mr. Wilson.

P. C.*
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February 3.

SARODA PROSAUD MULLICK, MANAGER OF SREENAETH SANNYAL, A
LUNATIC (PLAINTIFF) v. LUTCHMEEPUT SING DOOGUR AND
ANOTHER (DEFENDANTS).

See also
B.L.R. 62.

[On appeal from the High Court of Judicature at Fort William in Bengal].

*Execution—Security by Manager—Act VIII of 1859, ss. 232, 235, & 245,
248—272, 284—287—Attachment without Sale—Concurrent Orders for
Attachment in different Districts.*

The plaintiff, as manager of the estate of her husband, a lunatic, obtained a decree and attached and became the purchaser of the lands of the defendant in execution of the decree. The Judge required her to give security for the proceeds of the sale before he would allow actual possession to be given to her. The sale was confirmed, but several months elapsed before she found security, and mean-while the same lands were attached and purchased by other creditors under another decree against the said debtor, and possession was given to them. *Held* (reversing the decision of the High Court), the title of the plaintiff must prevail. The security was ordered for the protection of the lunatic against misappropriation by his manager; it was not a proceeding affecting the judgment-debtor. The second sale ought not to have been ordered or confirmed.

Under the Code of Civil Procedure, property may be attached without view to immediate sale.

A Court has power to send its decree for concurrent execution into several places, although in its discretion it may refuse to exercise such power.

* *Present* :—THE RIGHT HON'BLE SIR JAMES COLVILLE, SIR M. SMITH, SIR R. COLLIER, AND SIR L. PEEL.

THIS was an appeal from a decision of the High Court (Kemp and E. Jackson, JJ.), dated 26th March 1868 (1), reversing a decision of the Principal Sudder Ameen of Dinagepore dated 11th April 1862.

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In July 1861, Mooktakashee Dabee, as manager for her husband, who was a lunatic, got a decree against Judoonath Sannyal for a share of some zemindaries and about two lakhs of rupees.

When Mooktakashee Dabee desired afterwards to execute this decree on behalf of her husband, a question arose under the terms of the decree as to her right to do so without being appointed trustee of the estate by the Court, and giving sufficient security. She accordingly applied to the Court of the Principal Sudder Ameen, which had passed the decree, and tendered certain security as sufficient to cover the value of the lands decreed to her husband, and stated her intention of tendering further security to cover the sum that would be realized by sale in execution of the properties of the judgment-debtor, and asked that she should then be declared trustee of the lands and have possession given to her of them.

The Principal Sudder Ameen overruled an objection of the judgment-debtors against splitting the security, and made the order following:—

“ That at present the female-decree-holder be appointed trustee in respect of 5as. 6gds. 2c. 2k, of the zemindaries mentioned in petition, and possession be given in due form ; that a certificate, &c., be sent for giving possession of the share of the zemindaries situate in other districts, and that the execution of decree be proceeded with. Let it be known that on the decree-holder's furnishing security for the money that would be realized by the sale of the properties of the debtor and deposited in future, the same shall be paid over to the decree-holder, and in the event of her inability to do so, the said money shall be sent to the Collectorate.”

The execution case, being No. 54 of 1862, did accordingly proceed, and Mooktakashee Dabee, from time to time, had sold, by the Burdwan Court, under the decree, properties of the

(1). 9 W. R., reported as *Lutchmeeput Sing Doogur v. Mooktakashee Dabee*, 388.

1872 judgment-debtor within the jurisdiction of that Court, and became the purchaser at such sales, setting off the purchase-money, and giving security as required by the decree, to the satisfaction of the Court, prior to being allowed to take possession.

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Having thus exhausted the effects of the debtor in Burdwan, she, in or about March 1864, applied to the Court of the Principal Sudder Ameen of Burdwan, with a list of properties of the debtor in Zillahs Moorsshedabad, Hooghly, and Dinagapore, and having shown the amount that had been already realized, asked for a certificate under ss. 284 and 285 of the Code as to the debt remaining unsatisfied, and prayed that orders should be sent for the attachment and sale, in the first place, of the properties in Moorsshedabad, and for the attachment with a view to prevent alienation of the properties in Hooghly and Dinagapore.

The Principal Sudder Ameen on 19th. March 1864 made the following order, headed in the suit:—

“Balance due to the decree-holder after deducting the sum realized, principal with interest and the present costs, being Rs. 2,33,452-5-9-1, besides which interest shall be charged on Rs. 1,79,898-15-18-1 principal from the 29th February 1864 at 1 per cent. per mensem.

“The female decree-holder having this day presented a second application for execution stating that ere this in the former execution case No. 54 aforesaid, she realized out of the amount due under the decree, the sum of Rs. 2,690 by attachment and sale of the properties of the judgment-debtor situated in this district, and praying that for the realization of the balance, a certificate, &c., under ss. 284 and 285 of Act VIII of 1859, be first sent to Zillah Moorsshedabad for the attachment and sale of the properties within the jurisdiction of that zillah, and that a *rubakari* (proceeding) be at present sent to Zillahs Dinagapore, Hooghly, under s. 235 of the said Act for attachment by way of injunction, in order that the judgment-debtor may not give away or sell to another his properties appertaining to those districts; it appears that in point of fact, the decree-holder in the former execution case No. 54 aforementioned furnished good and sufficient security to the extent of Rs. 28,500 according to the direction contained in the decree whereupon the matter of obtaining possession of her husband's 5as. 6gs. 2cs. 2ks. share of the zemindaries appertaining to this district

and the district of Dinagepore, and in the matter of delivering possession to the extent of Rs. 25,000 being the proceeds of the said share, she obtained possession of the said share of the zemindaries in this Zillah and Zillah Dinagepore, and she realized the sum of Rs. 2,690 by the sale of the properties in this district, after which the former execution case was struck off on the 31st December of the past year. Whereas the security furnished by the decree-holder has been found good and sufficient to the extent of Rs. 28,500, whereof Rs. 25,000 relative to possession being deducted out of the balance Rs. 3,500, the proceeds of the properties within the jurisdiction of this Court which the decree-holder has purchased on her own bid for the sum of Rs. 2,690, and filed the receipt for the amount according to the former and present petition filed by the decree-holder to Rs. 246-2-3-1-1, so that there appears no bar to the attachment and sale of the judgment-debtor's properties in other districts to the extent of proceeds equivalent to the balance of the security Rs. 3,253-13-16-2-2. Rather, in the event of properties in excess of the sum of Rs. 3,253-13-16-2-2 on account of security being sold by auction, the decree-holder may after bidding for them herself, furnish security to the extent of proceeds of the above sum before taking out certificate of possession, and after depositing the security, take out certificate of possession. Under such circumstances it being necessary to transmit certificate, &c. first to Zillah Moorshedabad under ss. 284 and 285 of the said Act for attachment and sale of the properties in that Zillah, and to Zillahs Dinagepore and Hooghly, under s. 235 of the Act aforesaid for the purpose of preventing alienation,

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Ordered.

"That a copy of the decree and a certificate of this Court, and also a copy of the decree-holder's petition for revival of the execution with a specification at foot of the properties in Zillah Moorshedabad, be sent by a copy of this *rubákári* (proceeding) to the Judge of Moorshedabad for attachment and sale of the properties in that district, and that a certificate of this Court and a copy of the decree-holder's petition for revival of the execution with a specification below of the properties in Zillah Hooghly by a second copy of this *rubákári*, and further that a certificate of this Court and a copy of the decree-holder's petition for revival of the execution with a specification at foot of the properties in Zillah Dinagepore by a third copy of this *rubákári*, be forwarded to the Judges of those districts respectively, with a request that the Judge of Moorshedabad will, under the provisions of ss. 284 and 285 of

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the said Act, pass the proper orders regarding the attachment and sale of the properties of the judgment-debtor situated within his jurisdiction, and that the Judges of Zillahs Hooghly and Dinagapore will, under the provisions of s. 235 of the above Act, make an order for attachment of the properties of the judgment-debtor within the jurisdiction of their respective districts with a view to prevent alienation, and that they will be pleased to give intimation thereof to this Court; and that the execution case be struck off the register of pending cases."

The following certificate, dated the 19th March 1864, was granted by the Principal Sudder Ameen, headed as a certificate under s. 235 of Act VIII of 1859 :—

"The amount specified in the decree of this Court in Civil suit No. 17, decided on the 30th July 1861, principal, interest, and present costs, is Rs. 2,36,142-5-9-1, whereof the decree-holder in the former execution case having purchased from time to time the properties of the judgment-debtor, situated within the jurisdiction of this zillah, has set off their price against the amount due to her under the decree, the sum of Rs. 2,690 being deducted of that account, principal Rs. 1,79,898-15-18-1, and interest Rs. 53,256-6-0-3-2, and present costs Rs. 296-15-10, total Rs. 2,33,452-5-9-1, as per account, besides which interest on the principal from the 29th February 1864, and whatever the costs of the execution may be, shall be charged in the account.

"I hereby certify, that the above decree-holder having in execution of the said decree in the original suit, the application for execution being numbered 54, obtained possession of the properties in this district, and in the District of Dinagapore out of the properties decreed after furnishing security under the terms of the decree, has filed and attested the receipt for possession, and out of the amount due under the decree, in the said former execution case No. 54, she having purchased the properties of the judgment-debtors within the jurisdiction of this district on her own bid for the sum of Rs. 2,690, after attaching and bringing them to sale has set off the amount of the purchase-money against the sum due under the decree, and filed and attested the receipt for the same. The balance Rs. 2,33,452-5-9-1 as per account remains to be realized. No property of the judgment-debtor being found within, the jurisdiction of this district, she in the present execution case applies with a list of the judgment-debtor's properties in Zillahs Moorshedabad, Hooghly, and Dinagapore, and prays the *rubdkâris* be sent for the attachment and sale under ss. 284 and 285 of Act VIII of 1859,

in the first place, of the properties in Zillah Moorshedabad, and for the attachment, with a view to prevent alienation for the present of the properties in Zillahs Hooghly and Dinagepore under the provisions of s. 235 of the said Act, and under the provisions of that Act, execution of decree cannot simultaneously go on in three different districts, and the decree-holder is entitled to recover the balance as shown on this account with interest. Save the sum of Rs. 2,690 credited, no money whatever has been realized by execution. Consequently, in accordance with the prayer of the decree-holder in her application for revival of the execution, in the first place, a certificate, &c., are sent to the District of Moorshedabad, under ss. 284 and 285 of the said Act, requesting that the properties in that district may be attached and brought to sale. Further let certificates, &c., be sent under the provisions of s. 235 of the said Act for the attachment, with a view to prevent alienation of the properties in Zillahs Hooghly and Dinagepore to both those Zillahs, afterwards to those proceedings for attachment and sale of the properties in Zillah Moorshedabad shall have been completed, the proper orders will be passed on the decree-holder's application."

The present suit relates only to the property and proceedings in execution in Dinagepore.

The reason for not directing the sale immediately upon the attachment in these two latter districts, was that the Principal Sudder Ameen desired first to see what would be the result of the sales in Moorshedabad, before proceeding to sell the other properties of the debtor.

On the 29th of June, in pursuance of the above order, the following proceeding took place in the Court of the Judge of Dinagepore:—

"In the execution of the decree of the decree-holder, a *rubákàri* of the Principal Sudder Ameen of Zillah East Burdwan, directing that the properties of the judgment-debtor, situated in this district, be attached, and other papers having arrived the properties have been attached in due form. It being now unnecessary to keep this case pending,

Ordered,

"That this case be struck off from the list of pending cases, and that the papers be sent to the Principal Sudder Ameen of East Burdwan, by a copy of this *rubákàri*.

(Sd.) E. SANDYS,
Judge."

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The proceeds of sale of the Moorshedabad property amounted, together with the previous proceeds, only to Rs. 7,690. In consequence, Mooktakashee Dabee applied again in or about June 1865 to the Burdwan Court to have the record sent to the Dinagepore Court for the purpose of completing the execution proceedings.

On the 16th of June 1865, the Principal Sudder Ameen of Burdwan upon that application drew up a certificate, stating, that there then remained due on the decree, after all realizations, Rs. 2,56, 406 and fractions, and ordered as follows:—

“That the application for execution and other papers as per list, together with a certificate, be forwarded by a copy of this *rubākāri*, under ss. 234 and 235 of Act VIII of 1859, to the Judge of Zillah Dinagepore, with a request that proceedings in execution be taken, and that this case be struck off the register of pending cases of this Court. The decree-holder has stated in her application for execution that Rs. 7,690 have been realized by the sale of the judgment-debtor's property; of that sum of Rs. 2,690 appear to have been realized by the sale of the judgment-debtor's property in this Court. With regard to the remainder, which has been realized in Zillah Moorshedabad, the decree-holder should produce proofs of Court on that point before the Judge of Zillah Dinagepore.”

Upon this order reaching the Court of the Judge of Dinagepore, the Principal Sudder Ameen, then officiating for the Judge, on the 24th June 1865, ordered:—

“That the case be numbered, and the decree-holder do appear and prosecute;”

and on the 18th of July 1865, the Judge ordered:—

“That proclamation of sale be issued.”

On the 4th September 1865, the sale in execution of the properties in dispute took place, and Mooktakashee Dabee being the highest bidder, they were knocked down to her for the sum of Rs. 47,550.

On the 4th December 1865, the Judge of Dinagepore made an order in the execution case of Mooktakashee Dabee against Judoonath Sannyal.

“that the sale be confirmed, and on the auction-purchaser Mooktakashee Dabee, filing the proper stamp, the certificate of sale and the usual writ for delivery of possession be granted.” The reciting part of,

this order stated the fact of the attachment, and the proceedings generally in the case.

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On the 28th of December 1865, the Judge of Dinagapore passed an order in the same execution case

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"that the decree-holder take steps to obtain the certificate of sale, and possession of the properties sold, by furnishing security to the proper extent."

The reasons given for this order in substance were, that the proceeding of the Burdwan Court of March 1864 had stated that Mooktakashee Dabee was required to give security in the event of her purchasing herself, and that it appeared that the balance of security remaining after the former purchases fell far short of the value of the property now purchased by her.

The respondents were then seeking to have the same property sold in execution of a decree they had obtained against Judoonath Sannyal to which Mooktakashee Dabee objected under s. 246 of the Civil Procedure Code ; but on the 8th of January 1866, the right, title, and interest of Judoonath Sannyal in the property in dispute, which had been attached by the respondents in August 1865, in execution of a decree obtained by them against Judoonath Sannyal on the 29th of June 1852, was set up for sale in execution of the last-mentioned decree, and purchased by the respondents for the nominal value of Rs. 630.

On the 28th of February 1866, the Judge of Dinagapore gave the respondents a certificate, under s. 259 of the Code, to the effect that they had on the 8th January previous purchased whatever right, title, and interest the judgment debtor had in the said property sold by auction.

In the end of February 1866, Mooktakashee Dabee petitioned the Judge of Dinagapore, objecting to the respondents been given possession of the lands in suit, on the ground that they had been previously sold to her, and that nothing had passed by the sale of the judgment-debtor's interest therein to the respondents, and stated that she was "trying to furnish security, and to take out the certificate of sale, and take possession."

Thereupon conflicting orders were issued by the Court of the Judge of Dinagapore ; on the 6th of March 1866, he ordered

1872 possession of the lands in suit to be given to the respondents as
SARODA PRO- purchasers, and on the 17th of March 1866, by an order
BAUDMULLICK apparently made on Mooktakashee Dabee's petition of objection
V. of the 6th Falgoun 1272 (16th February 1866), it was or-
LUTCHMEEPUT dered :—
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"That as long as the security-bond was not filed and approved, so long no order could be made regarding possession, and as long as that was not disposed of, so long the delivery of possession to the other decree-holders be stayed."

By reports of the Court officers, it appeared that possession was not given to the respondents under the order of the 6th of March 1866.

On the 19th June 1866, the order to set aside which this suit was instituted, was made by the Judge of Dinagepore, and was as follows :—

"Both the petitioners and objector in this case have executed decrees against the judgment-debtor, and the same property has been sold in each decree. The objector's decree was first executed, and at the sale she became purchaser of the property.

"In the same way the petitioners also became purchasers of the said property at their own sale, and the question is now to which party is possession to be given.

"The objector claims as being the first auction-purchaser, but I perceive, in the proceeding of the Burdwan Civil Court, dated March 1864, from whence the order for attachment and sale of the property came, that a proviso was specifically introduced (in the event of the objector's becoming purchaser of the property) against the sale in her favor becoming absolute until a certain amount of security had been furnished by her.

"The sale took place on 4th September 1865, and the order for depositing security was communicated to the objector, but she has failed to comply with the requisitions, urging various excuses for doing so, which the Court declines to consider. Hence, the objector has not yet received a certificate of sale under s. 259, Act VIII of 1859.

"The petitioners have, in the meantime, executed their decree, and the sale of the property took place on the 8th January 1866, they themselves becoming purchasers.

"No such bar as to their obtaining possession exists, as in the case of the objector; and as the latter has neglected to carry out the conditions

imposed by the Court ordering the sale, she cannot be confirmed as purchaser. 1872

"Under these circumstances, I am of opinion, the petitioners should be put in possession according to law, ordered accordingly.

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(Sd) F. TUCKER,
Judge,"

Possession was given to the respondents of the property in suit by the Nazir of the Court of the Judge of Dinagapore in August 1866.

On the 7th December 1866, a proceeding of the Principal Sudder Ameen of Burdwan was drawn up, by which it was recited what had occurred as to Mooktakashee Dabee's execution and purchase, and that she had furnished security which the Principal Sudder Ameen considered satisfactory; and it was ordered that a copy of this proceeding should be sent to the Judge of Dinagapore, and he should be requested to give possession to Mooktakashee Dabee of the property in suit and a bill of sale (meaning a certificate), and return the papers to the Burdwan Court.

On the arrival of this proceeding, Mooktakashee Dabee presented a petition, asking to have effect given to it and possession, and a certificate given to her.

On the 28th of December 1866, the Judge of Dinagapore refused to carry out the order of the Principal Sudder Ameen of Burdwan, on the ground that having already given the respondents possession, he could not now give it to Mooktakashee Dabee.

On the 8th of February 1867, Mooktakashee Dabee, as such manager, as before-mentioned, filed her plaint in the Court of the Principal Sudder Ameen of Dinagapore, asking to have the Judge's orders set aside, and possession given to her of the properties in suit.

The respondents, by their written statement, raised three principal objections: first, that the Judge had set aside the plaintiff's sale, because she had not furnished security; second, that a certificate was necessary to give title, and none had been given to the plaintiff; third, that as after the comple-

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tion of the attachment (i. e., by the Dinagepore Court), the case was struck off from the number of the file, and the papers were transmitted to the Burdwan Court on the 19th of June 1866, the attachment was not in force, and the sale was not valid.

In one paragraph of the respondents' written statement was the following statement:—

“That the sale certificate was transmitted by the Burdwan Civil Court on the 19th March 1864, for the purpose of suing out execution of the decree obtained by the female plaintiff in attaching under the provisions of s. 235.”

The Principal Sudder Ameen held that by the sale to the plaintiff, and the subsequent confirmation of it, the interest of the judgment-debtor absolutely passed, and nothing remained for the second sale to operate on. That as to Mooktakashee Dabee not having furnished security, that might have been a ground for the Court of Wards to intervene on behalf of the lunatic's estate, and to take it out of the management of Mooktakashee Dabee, but could not invalidate the previous sale. And as to the objection that there was no second attachment, he held that as no prejudice was caused thereby to the defendants, it was not open to them to raise such an objection, and he decreed possession to the lady on behalf of the lunatic.

From this judgment, the respondents appeal to the High Court, and on the 26th of March 1868, a Division Bench of that Court (Kemp and E. Jackson, JJ.) allowed the appeal, and dismissed the plaintiff's suit with costs. (1).

On review, the judgment was affirmed, but Jackson, J., admitted that he found that the former judgment was erroneous in stating that no application had been made to the Burdwan Court, and that no certificate had been transmitted by it to the Dinagepore Court, which had attached and sold the property, but he was of opinion that the plaintiff below ought to have made a direct application to the Dinagepore Court for attachment.

Mooktakashee Dabee appealed to Her Majesty in Council, but pending the appeal, the present appellant succeeded her as manager on behalf of the lunatic.

Mr. *Cowie* and Mr. *Doyle* for the appellant.

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The High Court was under a misapprehension in the first judgment, and Kemp, J., remained under it in the judgment on review, in thinking that s. 285 had not been complied with, for an application was made to the Burdwan Court as appears by the respondents' own written statement, and the proper documents were forwarded to Dinagapore. There was no necessity for a direct application for execution being made to the Dinagapore Court, but even if that had been necessary, it was not an irregularity that would vitiate the sale, but would be cured by s. 256 and an equitable construction of the law. This latter objection was never raised save by Jackson, J., on review, and was never argued. It was an error to say that there was no attachment existing at the time of sale, or that a second attachment was required. Sections 257 and 259 of the Code show that the sale is absolute before the grant of the certificate, and the certificate is but evidence of the sale of the interest of the judgment-debtor.

Sir *R. Palmer*, Q. C., and Mr. *Leith* for the respondents.

The Dinagapore Court had no jurisdiction to order the sale. The condition was not complied with. There was "radical vice" in the proceedings when the matter was first sent to Dinagapore in as much as the attachment was ordered by way of sequestration or injunction only, and not as the first step in execution with a view to a sale, and so there has been no actual execution within the meaning of the Code. The Burdwan decree was not sent. There is nothing in the Code authorizing the transmission of these certificates to several Zillah Courts at the same time. The proceedings are irregular, and the sale to the lunatic's guardian clearly invalid.

Mr. *Cowie* in reply.

Their LORDSHIPS gave the following judgment:—

In this case, Mooktakashee Dabee, the manager of the estate of her husband—a lunatic—(of which the appellant is now

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manager) obtained a decree in the Zillah Court of East Burdwan against Judoonath Sannyal, for upwards of two lakhs of rupees. A small sum only having been realized in that Zillah, proceedings were taken to obtain execution of the decree on properties of the defendant Judoonath Sannyal within the jurisdiction of the Zillah Courts of Moorshedabad, Hooghly, and Dinagepore. It is with reference to what was done in Dinagepore that the questions arise.

In March 1864, a certificate and other papers were sent by the Judge of East Burdwan to the Judge of Dinagepore, the terms of which will be hereafter adverted to. Some time afterwards, but the precise date is not given, the Judge of Dinagepore attached the lands of the defendant in his Zillah, which form the subject of the suit. On 24th June 1865, another certificate was sent from the Judge of Burdwan; and on the 4th September, the lands of the defendant were sold under the decree to Mooktakashee Dabee, the decree-holder, and by an order of the Judge of Dinagepore, of the 4th December 1865, the sale was confirmed, and a writ of possession directed. It appears that the Judge of Dinagepore, in pursuance of the order of the Judge of Burdwan, required Mooktakashee Dabee to give security for the proceeds of the sale before he would allow actual possession to be given to her. Several months elapsed before she found the security, and meanwhile the present defendants, by order of the Zillah Judge of Dinagepore, obtained attachment and sale of the same lands under a judgment obtained by them against the same debtor Judoonath Sannyal; and on the 6th January 1866, the lands were sold in execution of their decree, and purchased by themselves, and possession afterwards given to them.

Mooktakashee then brought this suit against the present defendants (the respondents), asserting her title under the first judgment sale. It is conceded that her title must prevail, unless the sale under her execution can be invalidated.

The ground on which the Zillah Judge directed the giving of possession under the second sale to the respondents was that Mooktakashee having failed to give security, the sale to her became null. It is plain that this ground is utterly untenable.

The security was ordered for the protection of the lunatic plaintiff against misappropriation by his manager. It was not a proceeding affecting the judgment-debtor, and was entirely collateral to the course of the suit between the judgment-creditor and judgment-debtor. The omission to give this security could not in any way affect the title which had vested in the plaintiff by the previous sale. This decision of the Zillah Judge had the effect of causing the omission by the lunatic's manager to do an act intended to secure the fruits of his judgment to him, to operate so as to deprive him altogether of them, and hand them over to the second judgment-creditor. It is much to be lamented that such a misconception should have taken place.

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Their Lordships also consider that the Zillah Judge was in error in granting the order for the second sale under the respondent's attachment, and confirming the purchase by him, when the sale of the same lands had already taken place under Mooktakashee's attachment, and the purchase by her under that sale had been confirmed, and had not been set aside. Their Lordships cannot find that this course was in accordance with the Code of Procedure, The title had vested in Mookatakashee by the sale under her attachment and until it was set aside there was nothing upon which the second sale could operate. This course inevitably created a conflict between the two decree-holders, who became purchasers at the judicial sale, under their respective attachments, and led to the erroneous order of the 19th June 1866, which ordered the possession to be given to the respondents. Such a course also is in any case clearly contrary to the interests of debtors as well as creditors, as it is obvious that when property is offered at a second sale, with the cloud cast on the title by the subsisting first sale, it would be likely to go for an inadequate price.

In the present appeal, however, it was contented at their Lordships' Bar, by Sir Roundell Palmer, that the proceedings in the Court of Dinagapore, which resulted in the sale to the plaintiff were without jurisdiction, and that the sale under them was invalid on the ground of a "radical vice" in the proceedings when the matter was first transmitted by the East Burdwan

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Judge to Dinagepore in this:—that the lands of the judgment-debtor were ordered to be attached, not as the first step in an execution which might terminate in a sale, but by way of sequestration or injunction only, and therefore that the proceedings were not an execution or a step in it within the meaning of the Civil Procedure Code. It is plain, however, on reference to the Code, that property may be attached without view to immediate sale. The group of clauses, ss. 232—245, under the heading “of the execution of decrees for money by attachment of property,” prescribe the manner of attaching the various kinds of property and dealing with them when attached. Section 243 shows how debts and immoveable property are dealt with, and provides modes of satisfying the decree by them, without sale. Another group of sections, 248—272, headed “of sales in execution of decrees,” provide the procedure in case it becomes necessary to sell. It is obvious from these sections that, in the case of lands, the process of attachment and the order for sale may be distinct and separate, and that there may be a complete execution of a decree under an attachment without any order for sale. Then procedure is provided for the execution of decrees out of the jurisdiction of the Court in which they are made. Section 284 and following clauses empower the Judge on application, “unless there be any sufficient reason to the contrary,” to transmit a copy of the decree with a certificate that satisfaction of it has not been obtained in his jurisdiction, and a copy of any order for execution of such decree that may have been passed,” to any Court to which the applicant may wish the decree to be executed.” The Court to which they are sent is to file them, and s. 287 enacts that “the copy of any decree, or of any order of execution, when filed in the Court to which it has been transmitted for execution, shall for such purpose have the same effect as a decree or order for execution made by such Court.”

The certificate or order of the Judge of Burdwan, of 19th March 1864, sent to the Judge of Dinagepore, contains, in substance, a recital or statement of the decree of the East Burdwan Court, the amount recovered by execution, the balance due, and that the decree-holder had given a list of

properties in Zillahs Moorshedabad, Hooghly and Dinagepore, and then declares that "a certificate, &c., are sent" to Moorshedabad, 'under ss. 284 and 285, requesting that properties in that district may be attached and brought to sale, and that certificates, &c., be sent under s. 235 for attachment, with a view to prevent alienations of properties in Zillahs Hooghly and Dinagepore. It ends thus, "afterwards, when proceedings for attachment and sale of the properties in Moorshedabad shall have been completed, the proper order will be passed on the decree-holder's application."

The objection was, in effect, that this order treated the attachment directed to be made in Dinagepore as an injunction or sequestration only. Their Lordships, however, think that this was not so, but that it was meant that the attachment should be a proceeding in execution of the decree. The proceeding was, on the face of it, declared to be a direction to attach under s. 235; and that section only authorizes the attachment as a step in execution. No doubt, every attachment involves an injunction, which is indeed one of its necessary effects. But when an act of a Court can be so construed as to have an operation consistently with law, it would be contrary to ordinary rules of construction to attach to it another signification which would altogether destroy its effect. Their Lordships, therefore, consider that what the Court intended to do was to transmit the proceedings to the three zillahs for execution, with a direction that the first process of execution, viz., by attachment, should take place in all, but that further proceedings under the attachments should not be taken in Hooghly and Dinagepore until the result of the completed execution in Moorshedabad was known. It has been already pointed out that the procedure of the Code contemplates, in the case of lands, the issuing of separate orders, subsequent to the attachment, for the sale or other disposition of them.

A more important point involved in the case is whether the transmission could be made to the three Zillah Courts concurrently, for the purpose of execution. On consideration of the Code, their Lordships can find nothing to prevent this being done. On the contrary, the procedure is well adapted to allow

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1872 of it, and of its being done most beneficially for the creditor.

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and without injustice to the debtor. If it were not so, the debtor might be able to get rid of his property before it could be attached. On the other hand, there is provision for the protection of the debtor, for the issuing of the execution in more *zillahs* than one is made subject to the control of the Judge, who may refuse to do so, where he saw there was "any sufficient reason to the contrary" (s. 286). Again, after the attachments have been granted, if there should be any ground of complaint, the debtor and any parties interested may apply, under the provisions of the Code, to remove or stay proceedings under them. It would, no doubt, in many cases, be a right exercise of the discretion of the Court not to act on the power, and to refuse to send a decree for concurrent execution into several places; and when it did act on it, it would be, in many cases, proper to impose terms on decree-holders, that they should not proceed to sale under all the attachments at once. This is really what was meant to be done here, although it was not done in a very good and satisfactory form.

The case is thus reduced to the objection, that a copy of the decree was not transmitted to Dinagapore. The High Court rest their first judgment on the ground that no copy of the decree or of the certificate, that satisfaction had not been obtained, was sent. The latter document clearly was sent. In the judgment on review, Mr. Justice Jackson came to the conclusion that both were transmitted. Mr. Justice Kemp alone retained his former view. Assuming that, if no copy of the decree was sent, the attachment made at Dinagapore would be without valid authority, which their Lordships do not find it necessary to determine, it lies on the defendant to prove that it was not transmitted. The Judge at Dinagapore acted on the certificate by attaching the lands, and afterwards sold under that attachment. The maxim, therefore, *omnia præsumuntur rite esse acta*, must prevail until the contrary is shown. It certainly is not shown by the document of 19th March 1864 (1), for it is there stated that "certificates, &c.," were sent; nor by the memorandum of the attachment (2) which refers to the *rubakari* "and other papers"

(1) *Ante*, p. 218.

(2) Dated 29th June 1864, *ante*, p. 219.

having arrived. On the contrary, it may be presumed from them that all necessary documents were transmitted. It is said that it must be inferred from the order which preceded the document of the 19th March that it was not intended to send the copy of the decree to Dinagapore. This, perhaps, may be inferred from that document taken alone, but it would not be safe to act on such an inference to annul the attachment and sale, especially when it is consistent with the language of the subsequent documents, that the copy was sent with the other papers on the 19th of March; or, at all events, before the attachment was made.

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On the whole, their Lordships consider that the appeal should be allowed; and will humbly advise Her Majesty that the decree of the High Court should be reversed, that the decree of the Principal Sudder Ameen should be executed, and that the appellant should have the costs of the litigation in India and of this appeal.

Appeal allowed.

Agents for appellants : Messrs. *Watkins and Lattey.*

Agent for respondents : Messrs. *Walters and Gush.*

FULL BENCH.

*Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice L. S. Jackson,
Mr. Justice Glover, Mr. Justice Mitter, and Mr. Justice Pontifex.*

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Act XL of 1858—8 Hindu Resident and domiciled in Calcutta, Majority of.

The age of majority of a Hindu resident and domiciled in the town of Calcutta and not possessed of any property in the mofussil, is the end of fifteen years.

See also—
15 B.L.R. 72.
12 B.L.R. 359

The following questions were referred on August 21st, 1872, by Macpherson, J., for the opinion of a Full Bench:—

1. "What is the age of majority of a Hindu resident and domiciled in the town of Calcutta, and not possessed of any property in the mofussil?"

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2. To what extent does Act XL of 1858 have operation on persons resident in the town of Calcutta?"

The grounds of reference were stated as follows :—

"The petitioner, Benud Behari Mullick, is entitled to have certain moneys which are now in Court in the hands of the Receiver paid over to him on his attaining majority. He applies for payment of the money now, on the ground that he has attained majority. He states in his petition (which is verified :— 'That your petitioner, is a resident of Calcutta from his birth and domiciled therein, and that Romanath Mullick, the father of your petitioner, was also a resident of Calcutta and domiciled therein, and that your petitioner has no properties situated in the mofussil; that your petitioner is of the age of sixteen years and six months, and has therefore attained his majority.'

This raises the question whether, under Act XL of 1858, eighteen is the age of majority of Hindus resident and domiciled in the town of Calcutta, and not possessed of property in the mofussil.

Until quite recently sixteen was always deemed to be the age of majority among Hindus in Calcutta: but doubts have been entertained on the subject since the decision of the Full Bench in the case of *Madhusudan Manji v. Debigobinda Newgi* (1); and in *Jadunath Mitter v. Poyle Chand Dutt* (2), Phear, J., held that, by the operation of Act XI. of 1858, the period of minority extends, among Hindus, to eighteen years, as well within the original civil jurisdiction of the High Court, as within the jurisdiction of the civil Courts in the mofussil. More lately the same learned Judge held in *Archer v. Watkins* (3) that an Eurasian in Calcutta, who is not an European British subject, comes under Act XL of 1858, and therefore attains majority at eighteen years.

The question was raised before me (but not decided) in the case of *In the goods of Gungaprasad Gosain* (4), and also before the Appellate Court in the same case on appeal (5). In his

(1) 1 B. L. R., F. B., 49.

(2) 7 B. L. R., 607.

(3) 8 B. L. R., 372.

(4) 4 B. L. R., App., 43.

(5) 5 B. L. R., 80.

judgment in the case of *Kamikhaprasad Roy v. Srimati Jagadamba Dasi* (1), Markby, J., states that as, in the course of evidence, it appeared that one of the parties was of the age of seventeen years, "and as it has been held that a Hindu does not come of age till eighteen, he had ordered a guardian for him to be appointed, &c."

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It appears to me that Act XL of 1858 was intended to apply to the mofussil, and not to persons in the town of Calcutta and not possessed of property in the mofussil. But the matter is a very important one, and, therefore, I refer it for the decision of a Full Bench."

The *Advocate-General*, offg (Mr. Paul and Mr. Woodroffe for the petitioner.

Mr. Lowe for the plaintiff.

Mr. Kennedy for the defendant, who was the petitioner's guardian.

Mr. Phillips for the Receiver.

The *Advocate-General*.—The title of Act, XL of 1858 cannot be taken into consideration in construing the Act—7 Bac. Abr., 452. To ascertain the purposes of the Act, we must look at the Regulations repealed by s. 1, and in lieu of which the Act was passed. All those Regulations relate to the mofussil. S. 29 of Act XL of 1858 says:—"The expression 'Civil Court,' as used in this Act, shall be held to mean the principal Court of original jurisdiction in the district, and shall not include the Supreme Court; and nothing contained in this Act shall be held to effect the powers of the Supreme Court over the person or property of any minor subject to its jurisdiction." Then s. 26 defines who are minors for the purposes of the Act. A person who has no property would not be within the scope of the Act, nor would he be disentitled to sue for work and labor

(1) 5 B. L. R., 517.

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done after he has attained the age of sixteen. [JACKSON, J., referred to s. 2.] I submit that the Act merely relates to the case of Hindus holding property in the mofussil. The view taken by Phear, J., in *Jadumath Mitter v. Boyle Chand Dutt* (1), is incorrect. It rests on a fallacy resulting from his having taken the title and preamble of the Act, and drawn an argument therefrom ; but, as I have already shown, the title cannot be looked at, and the preamble leads rather to an inference contrary to that drawn by his Lordship.

It is said in that case that, if the Court holds that the period of majority in the presidency town is sixteen years, there would be an anomaly ; but there must be anomalies where two separate Courts have to apply different laws. From the very commencement the Legislature has guarded itself against interfering with the law of Hindus in presidency towns. Had it intended to make eighteen the age of majority for all purposes in Calcutta, it would have expressed that intention in clear language, but not only has it omitted so to do, but the whole history of Legislature on the subject shows that such was not its intention ; the Succession Act, the Hindu Wills' Act, and both the Limitation Acts specially fix the age of majority for the purpose of those Acts respectively ; this would have been unnecessary if Act XL of 1858 had once for all fixed the age of majority at eighteen. The words "for the purposes of the Act" are words of restriction limiting the application of the Act to those cases only in which the Act itself is invoked. [COUCH, C.J.—The Full Bench decision in *Madhusudan Manji v. Debigobinda Newgi* (2) goes beyond that, and we are bound by the Full Bench decision.] I do not think that that has been the invariable practice, for instance, in the case of *Mahomed Akil v. Asadunnissa Bibee* (3), a Full Bench decision was afterwards set aside by a Bench of six Judges [JACKSON, J.—In that case it was held that the minutes written by three Judges, who had retired or were no longer members of the Court, could not be looked on as judgments so as to influence the decision to be given on appeal.

(1) 7 B. L. E., 607.

(3) 9 W. R., 1.

(2) 1 B. L. R., F. B., 49,

By a rule (1) passed in July 1867, every decision of a Full Bench is to be treated as a conclusive authority upon the point of law or usage having the force of law, determined by the Full Bench, unless it be (subsequently) reversed, or a contrary rule be laid down by the Privy Council. *COUCH, C.J.*—It would be better in future if it were strictly the practice to consider that a Full Bench decision settles the law.] I would only draw the Court's attention to the fact that the High Court of Bombay has ruled differently; see the supplement to Thomson on Limitation, p. 7 note. In *Archer v. Watkins* (2), *Phear, J.*, held that Act XL of 1858 was applicable to Eurasians. If that is correct, the Act does affect the powers of this Court. In *In the goods of Gungaprasad Gosain* (3), *Macpherson, J.*, though he refuses to express any opinion on the point, does seem to think that Act XL is a *mofussil* Act.

No objection was raised either on behalf of the plaintiff or of the guardian to the order prayed for.

Mr. Phillips for the Receiver.—It is not disputed that the preamble of Act XL of 1858 may be considered in construing the Act. The preamble is followed by a series of provisions describing how the Civil Courts are to act in respect of the property of minors. But the Act does not affect the powers of the Supreme Court which all along has a similar jurisdiction in respect of Hindus in Calcutta. The Act, I submit, recognizes those powers, while it brings persons in the *mofussil* under the jurisdiction of the Civil Courts. The Full Bench decision recognizes the applicability of the Act to persons with respect to whom its provisions might be put in force although none of its provisions have in fact been put in force, and it may well be that s. 26 was intended to define the age of majority both for the Civil Courts in the *mofussil* and the Supreme Courts in presidency towns. In *Jadunath Mitter v. Boyle Chand Dutt* (4), *Phear, J.* answered

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(1) *Rule passed July 1867.*—"Every decision of a Full Bench shall be treated as a conclusive authority upon the point of law, or usage having the force of law, determined by the Full Bench, unless it be (subsequently) reversed, or a contrary rule be laid down by the judicial Com-

mittee of the Privy Council. A Full Bench shall consist of not less than five Judges." See Broughton's Civil Procedure, 4th edition, App., 710.

(2) 8 B. L. R., 372.

(3) 4 B. L. R., App., 48.

(4) 7 B. L. R. at p. 614.

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the argument that his construction of the Act would affect the powers of the Court by observing that it would only extend the period of time during which those powers could be exerted ; but there is yet another answer, *viz.* that any alteration in the age of majority can only affect the *status* of person who are minors ; the power of the Court over minors will be the same but the persons who are minors will be different. [COUCH, C.J.— If the Court could not order the property under its control of a person under eighteen to be made over to him, that would be affecting the powers of the Court.] I submit not ; it could scarcely be said that the powers of the Court over infant foreigners subject to its jurisdiction would be affected by a law of their native country which should alter the age of majority. The argument against the construction put upon Act XL by the Advocate-General derived from the inconvenience which would arise from the same person having a double *status* is a very strong one if admissible.

The *Advocate-General* did not reply on the arguments as to the extent of Act XL of 1858 ; but submitted that the true construction of the rule referred to by Jackson, J., was that the decision of a Full Bench might be reversed by another Full Bench. [COUCH, C.J.—Only where it has been reversed by the Privy Council.]

Cur. adv. vult.

The judgment of the Court was delivered by

COUCH, C.J. (who, after reading the questions referred, continued).—Having heard these questions argued by the Advocate-General, who appeared for the petitioner, we thought it advisable before giving our opinion to learn what rule had been followed by the Supreme Court, and afterwards by the High Court since the passing of Act XL of 1858, and before the decisions mentioned in the order of reference. We therefore caused a search to be made among the records of the Court on the Original Side, and the result of it is this :—

In *Keerut Chunder Sircar v. Holodker Ghose*, a report was made by Morgan, J., on the 22nd of April 1863, finding that the infant plaintiff Bhoobunmohun Ghose had attained his full age of sixteen years; and an order dated the 6th of May 1863 was made, discharging the next friend of the plaintiff, and allowing him to prosecute the suit.

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In *Desender Narain Roy v. Ohhoy Churn Sen* it having been proved by affidavit that the plaintiff had attained the age of sixteen years, an order was made on the 15th December 1863 discharging the next friend of the plaintiff, and allowing him to prosecute the suit.

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In *Ananda Gopal Dutt v. The Secretary of state*, Levinge, J., made a report dated 30th January 1864, finding that the defendant Bhoobunmohun Dutt had attained his full age of sixteen years, on which an order was made on the 25th of February 1864, directing the defendant's share of the fund in Court to be paid to him.

In *Anund Lall Dutt v. Sreemutty Monomohun Dossee*, an order was made on the 25th of August 1864, discharging the next friend of Anund Lall Dutt, and allowing him to continue the suit, as he had attained the age of sixteen years.

In *Monohur Doss v. Bullub Doss*, an order was made on the 14th of January 1867, discharging the Receiver as to Ramkissen Doss's share of the property, and directing his share to be delivered to him, he having attained the age of sixteen years. In the same suit a like order was made on the 10th of September 1868, as to Radhakissen Doss's share of the property, he having attained the age of sixteen years.

In *Pertab Chunder Sett v. Tacoor Dass Sett*, an order was made on the 23rd of March 1871. discharging the Receiver, and directing the plaintiff's share of the property to be delivered to him, as he had attained the age of sixteen years.

In *Monmothanauth Day and Onathnauth Day v. Aushootosh Day*, a report was made by Sir Charles Jackson on the 24th of September 1862, which found that the plaintiff Monmothanauth Day had attained the full age of sixteen years, and an order was made on the 14th of June 1866, directing the arrears of maintenance and future maintenance, to be paid to him

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out of the fund in Court. In the same suit a report by Phear, J., was filed on the 8th of August 1866, finding that the other plaintiff Onathnauth Day had attained his full age of sixteen years; and an order was made on the 2nd of March 1867, directing the arrears of maintenance and future maintenance to be paid to him out of the fund in Court. Then, in the same suit, an order was made, dated the 8th of August 1872, discharging the Receiver, and directing the property in his hands to be delivered and paid to the plaintiffs.

On the 11th of May 1867, in the suit of *Otool Chunder Bose v. Sreemutty Komulmonsee Dossee*, Otool Chunder Bose having attained the age of sixteen years an order was made for the discharge of the next friend.

In *Sreemutty Gobindsoondery Dabee v. Hem Chunder Gossain and Gopaul Chunder Gossain*, an order was made on the 18th of December 1871, discharging the guardian, *ad litem*, Gopaul Chunder Gossain having attained the age of sixteen years.

In another suit, *Sreemutty Unnopoorina Dossee v. Bhooibun Mohun Neoghy*, an order was made on the 19th of September 1872 for the discharge of the next friend, the plaintiff having attained the age of eighteen years; and, subsequently in another case (*In the goods of prosénno Ooomar Tagore, deceased*), on the 20th December 1872, on the statement that the guardian of the infants had declined to act further, and that one of the infants had attained his majority or age of 18 years an order was made that another guardian should be appointed for the other persons who were still infants.

It seems that, until the order of Markby, J., in the case of *Kamikhprasad Roy v. Srimati Jagadamba Dasi* (1), the age of majority of a Hindu resident in Calcutta was considered in this Court to be sixteen years. It does not appear that there was any argument upon the question before Markby, J., made the order which he refers to in his judgment in *Kamikhprasad Roy v. Srimati Jagadamba Dasi* (1). In the argument in *Jadunath Mitter v. Bolye Chand Dutt* (2), an unreported decision of Norman, J., to the same effect is quoted, but the date

(1) 5 B. L. R., 508, at p. 517

(2) 7 B. L. R., 607.

of it is not given. In the case before Phear, J., *Jadunath Mitter v. Bolye Chand Dutt* (1), the question was argued, and the decision reserved. This was in August 1871, from which time it seems that decision has been followed. In considering the questions referred to us, we cannot overlook the fact that for more than ten years after the passing of Act XL of 1858, the Judges of this Court sitting on the Original Side did not consider that it had made any alteration in the law administered by this Court on its Original Side as to the age of majority of Hindus which had been held in the Supreme Court—*Nocoor Bysack v. Gopaulchund Seal* (2)—to be sixteen years. And no doubt this view of the law must have been frequently acted upon during those years, and many titles to property in Calcutta must depend upon it. However great the inconveniences which would arise from our coming to a decision invalidating those titles might be, we should be bound to do so, if the construction of the Act were clear; but if it is doubtful, this inconvenience may be a reason for following what we may regard as the contemporaneous exposition of the Act.

The question depends upon what is meant in s. 26 by the words “for the purposes of this Act, every person shall be held to be a minor, who has not attained the age of eighteen years.” The title of the Act is “an Act for making better provision for the care of the persons and property of minors in the Presidency of Fort William in Bengal.” If we looked only at the title and s. 26, we might say that the town of Calcutta was within the purposes of the Act, it being included in the Presidency of Fort William. But the title of an Act, although it may sometimes aid in the construction of it, is not a safe expositor of the law, being often loosely and carelessly inserted. And there is the established rule that, in the exposition of Statutes, the intention is to be deduced from a view of the whole and of every part taken and compared together. The general statement in the title and preamble of the Act is not sufficient to show what are its purposes. We must look for them in the provisions which are made in it. The purpose is stated generally in s. 2, viz., the subject-

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(1) 7 B. L. E., 607-

(2) Mor. Rep., 82.

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ing to the jurisdiction of the Civil Court the care of the persons of all minors (except European British subjects) and the charge of their property, except proprietors of estates "who have been or shall be taken under the protection of the Court of Wards." The sections which follow contain provisions for effecting this, and are followed by s. 26. We think the word "purposes" there refers to the provisions in the preceding sections. Then s. 29 defines the expression "Civil Court" as used in the Act to be the principal Court of original jurisdiction in the district, and not to include the Supreme Court. Consequently, none of the powers conferred by the Act could be exercised within the jurisdiction of the Supreme Court. The proviso that nothing contained in the Act should be held to affect the powers of the Supreme Court over the person or property of any minor subject to its jurisdiction was unnecessary, and seems to have been inserted from abundant caution.

We think the construction which was first put upon the Act, that it did not alter the Hindoo law in Calcutta as to the age of majority, was the right one; and that such a change was not intended by the legislative authority when the Act was passed. If it is desirable that the law should be uniform in Calcutta and the mofussil, it may be made so by the Legislature without affecting existing titles, which must be affected by a decision of this Court, as we should declare what the law has been since the passing of Act XL of 1858. As to Phear, J.'s reason that we ought not to attribute to the Legislature the intention to set up for the same persons two standards of majority, one to prevail in the mofussil, and the other in Calcutta, we think the answer is that two standards have been set up in the Mofussil by Regulation XXVI of 1793, and it was the state of the law until Act XL of 1858 was passed. It appears to us that the grounds upon which the Full Bench came to the decision in *Madhusudan Manji v. Debigabinda Newgi* (1) do not apply to the questions before us.

We think the first question should be answered by saying that the age of majority in such a case is the end of fifteen years.

(1) 1 B. L. R., 49.

The second question does not arise in the case, it being stated that the petitioner has no property in the mofussil. We will not undertake now to define to what extent the Act may operate when a person resident in the town of Calcutta has property in the mofussil.

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Attorney for the plaintiff: Baboo Womesh Chunder Banerjee.

Attorney for the petitioner: Baboo Gresha Thunder Mitter.

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Attorney for the petitioners's guardian: Baboo Sreenath Chunder.

Attorneys for the Receiver: Messrs. Berners, Sanderson, and Upton.

ORIGINAL CIVIL

Before Mr. Justice Macpherson.

RAJMOHUN BOSE AND ANOTHER v. THE EAST INDIA RAILWAY COMPANY.

1872
Sept. 9 to
13 &
Nov. 18.

Jurisdiction—Letters Patent, 1865, cl. 12—Act VIII of 1859, s. 5—Suit for Land—Nuisance—Acts done under Powers conferred by the Legislature—Reg. I of 1824—Act XLII of 1850—Land taken for Public Purposes—Injunction—decree—time to abate nuisance—Liberty to apply.

The plaintiffs, the owners and occupiers of a house and premises in Howrah, sued for an injunction to restrain a nuisance caused by certain workshops, forges, and furnaces erected by the defendants, and for damages for injury done thereby.

The defendants were a Railway Company incorporated under an Act of Parliament for the purpose of making and maintaining railways in India, and by an agreement (entered into under their Act of Incorporation) between them and the East India Company, they were authorized and directed to make and maintain such railway stations, offices, machinery, and other works (connected with making, maintaining, and working the railways) as the East India Company might deem necessary or expedient. The workshops complained of were erected in 1867 under the sanction of the Bengal Government on land purchased by the Government in 1854 for the purposes of the railway under Regulation I of 1824 and Act XLII of 1850, and which had been made over to the defendants.

Held, that the suit was *in personam*, and not a suit "for land or other immoveable property," within the meaning of cl. 12 of the Letters Patent, 1865, or of s. 5 of Act VIII of 1859.

See also
14B.L.R. 12.

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Held further, a nuisance having been proved to exist, that is to say, such annoyance as materially interfered with the ordinary comfort of human existence in the house and caused sensible injury to the property of the plaintiffs, the defendants could not plead laches or acquiescence on the plaintiffs' part, as, upon the plaintiffs complaining in May 1870, the defendants had admitted that there was a nuisance, and had up to June 1871 made various efforts to abate it. Nor could the defendants escape liability on the ground that the nuisance had been caused by them in the reasonable exercise of powers conferred upon them by the Legislature.

An injunction was granted restraining the defendants, and liberty to apply was reserved, in the decree. On a motion by the defendants, supported by an affidavit showing the alterations which they proposed to make with the view of abating the nuisance, and alleging that a period of three months was required to carry out these alterations, and that a refusal to grant this time would necessitate the closing of the Company's workshops and would occasion great inconvenience, the Court granted the time asked for, on the conditions that the defendants paid the costs of the application, and did all they possibly could in the meanwhile to prevent annoyance to the plaintiffs.

THE plaintiffs in this case, the owners and occupiers of a house and premises in Chandmaree Road, Howrah, sued for an injunction to restrain the continuance of a nuisance arising from certain furnaces, chimneys, forges, and other works erected by the defendants in 1867, opposite and close to the plaintiffs' premises, and to recover damages for the injury done thereby. The plaintiffs stated in their plaint that "by reason of smoke, blacks, and other gaseous effluvia arising from the said fire furnaces, &c.," entering their house, they were annoyed, their moveable property injured, and their house and premises rendered unfit for convenient and comfortable habitation, and diminished in value.

The defendant disputed the plaintiffs' title to the premises injured; the jurisdiction of the Court; the fact of the alleged nuisance; and the right of the plaintiffs, even if there were a nuisance, to an injunction or damages in respect of it, since it had been caused by the defendants on land taken by the Government for the purposes of the railway, and in the careful and reasonable exercise of powers conferred by the Legislature; and they contended finally that, if the plaintiffs ever had any remedy, they had lost it by their laches and acquiescence.

The defendants had previously raised the question of jurisdiction before Markby, J., in an application to have the plaint taken off the file on the ground that the suit was for land or

other immoveable property ; but his Lordship had dismissed the application, as he was of opinion that the suit was not a suit for land within cl. 12 of the Letters Patent, 1865, and also that the defendants were personally liable to the jurisdiction of the High Court by reason of their carrying on business in Calcutta, where their chief office was situated.

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The defendant Company was incorporated under 12 & 13 Vict., c. 98, for the purpose of making and maintaining railways in India, and by an agreement of the 17th August 1849 entered into under that Statute between the East India Company and the Railway Company, the latter was authorized and directed to make and maintain such railways, stations, offices, machinery and other works and convenience (connected with the making, maintaining, and working the railways) as might be deemed necessary and expedient by the East India Company. This agreement had been subsequently confirmed by the Imperial Government.

The workshops complained of were erected by the defendants, under the sanction of the Bengal Government, on land originally belonging to the plaintiffs' father, and purchased from him by Government in 1854 for the purpose of the railway under Regulation I of 1824 and Act XLII of 1850, and which had been duly made over to the defendants.

At that time the plaintiffs' present house was a mere bungalow without an upper story, but since then the plaintiffs had repaired and largely added to it. In 1855 a portion of the upper story was built; and in 1864 several rooms were added both on the lower and upper floors. The defendants' workshops were built shortly after, but they had originally been used as carriage shops and for other purposes which caused no nuisance. Since 1868 they had, as the plaintiff alleged, been used in the manner complained of. In May 1870 the plaintiffs called the defendants' attention to the annoyance arising from large volumes of smoke and soot thrown out by chimneys recently erected by the defendants opposite their premises, and which, at the defendants' request, they pointed out, and they subsequently repeatedly complained to the defendants of the nuisance. In answer to their letters the defendants replied that they were taking steps to remove it, and

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they did in fact make extensive alterations, adding several new chimneys and raising some already built. Their endeavours to provide a remedy however proving ineffectual, the plaintiffs, on the 23rd August 1871, called upon them either to stop the works, or to allow the plaintiffs compensation; and upon their refusal the present suit was brought.

The issues raised at the trial were:—Did a nuisance exist; if so, was it actionable: was the suit barred by lapse of time; and had the Court jurisdiction to entertain it.

Mr. Kennedy, Mr. Ingram, and Mr. Woodroffe for the plaintiffs:

The *Advocate-General* offg. (Mr. Paul), Mr. Phillips, and Mr. Allen for the defendants.

Mr. Kennedy.—The plaintiffs' title cannot be challenged. Mere possession is sufficient to enable them to maintain the suit—*Bhuban Mohun Banerjee v. Elliott* (1). The fact that the lands were acquired for a public purpose would not give the defendants any higher right than those possessed by an ordinary purchaser. The Government did not confer on the defendants the rights to use their land to the detriment of others, even supposing the works were necessary for the existence of the railway. The Act incorporating the defendant company embodies the Company's Clauses Act only, but not the Lands or the Railways Clauses Acts; the defendants therefore have no special powers except those given by the first mentioned Act—*The King v. Pease* (2). Even that case was questioned by the Exchequer Chamber in *Brand v. The Hammersmith and City Railway Co.* (3) [Mr. Phillips.—That judgment was reversed by the House of Lords (4).] Then see *Tipping v. The St. Helen's Smelting Co.* (5). The objection to jurisdiction cannot be supported. The suit is in no sense a suit for land; see *Saya Loo v. Nga Paw Loo* (6). [MACPHERSON, J.—In

(1) 6 B. L. R., 85.

(2) 4 B. & Ad., 30.

(3) L. R., 2 Q. B., 222.

(4) L. R., 4 H. L., 171.

(5) 4 B. & S., 608.

(6) 6 W. R., Civ. Ref., 4.

Oatley v. Ramsay (1), Malins, V.-C., granted an injunction to restrain a man from shooting over a moor in the north of Scotland. The owner of the moor leased it to A, and subsequently getting a better offer leased it to B. A applied for an injunction against B, and obtained it on the ground that it was a purely personal matter.] In *Robinson v. Carey* (2), this Court gave damages in an action for trespass to a house at Barrackpore [Macpherson, J.—That case was removed for trial before the High Court in the exercise of its extraordinary original civil jurisdiction.] The plaintiffs complain not merely of the injury to their premises, but also of the personal injury to themselves.

The *Advocate-General* for the defendants.—No action will lie against the defendants, the land having been taken by the Government for a public purpose, and made over to the railway Company, and these workshops erected, under the express sanction of Government; see *The King v. Pease* (3). There may be *damnum*, but no compensation being provided by law it is *damnum absque injuria*—*Boulton v. Crouther* (4). The defendants did not act in a wanton or arbitrary manner, but did their best, to remedy this alleged nuisance—*The London and North-Western Railway Co. v. Bradley* (5), *Croft v. the London and North-Western Railway Co.* (6), *Vaughan v. The Taff Vale Railway Co.* (7), *The Manchester South Junction, &c., Railway Co. v. Fullarton* (8), and *The Hammersmith and City Railway Co. v. Brand* (9). The plaintiffs do not contend that the defendants have erected their works negligently, but that they had no right to erect them at all; but it was necessary to have these workshops and furnaces somewhere on the premises; and as the defendants were authorized to erect them, there is no actionable wrong. Having regard to the position of the premises and the habits of the natives of this country, there was clearly no nuisance; see the remarks of Westbury, L. C., in *The St.*

(1) The case appears to be unreported, but the granting of the injunction is mentioned in a report of further proceedings between the parties; see *The Weekly Notes* for Dec. 28, 1872, p. 235.

(2) *Coryton*, 137.

(3) 4 B. & Ad., 30.

(4) 2 B. & C., 703

(5) 6 Rail Ca., 581.

(6) 32 L. J., Q. B., 115; S. C., 3 B. & S., 436.

(7) 5 H. & N. 679.

(8) 14 C. B., N. S., 54.

(9) L. R., 4 H. L., 171

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1872 *Helen's Smelting Co. v. Tipping* (1). As to what constitutes a nuisance, see *Orump v. Lambert* (2). The nuisance, if there be any, is of so trifling a nature that the Court ought not to interfere—*Attorney General v. Gee* (3). The learned Counsel also referred to the following cases—*Hole v. Barlow* (4), *Casey v. Ledbitter* (5), and *Bankart v. Houghton* (6). Then as to the jurisdiction of the Court, suits for foreclosure or redemption have been held to be suits for land—*Bibee Jann v. Meerza Mahomed Hadee* (7) and *Sreemutty Lalmoney Dossee v. Juddoonauth shaw* (8). [MACPHERSON, J.—The direct object of such suits is to obtain possession of land, or to perfect the plaintiffs' title.] Mesne profits are in the nature of damages for trespass, yet a suit for mesne profits is within the meaning of the words "suit for land." The fact that the defendants are personally subject to the jurisdiction will not avail the plaintiffs when the venue is not transitory. *Mostyn v. Farigas* (9) was a case of personal injury, and there were no Courts in Minorca competent to deal with the case. *Penn v. Lord Baltimore* (10) was for specific performance of a contract. In cases of this nature, the Court must be in a position, enabling it fully, to adjust the relative rights of the parties, which it could not do in the present case; see *Barrow v. Archer* (11).

Mr. Kennedy in reply—It is admitted that the defendants are personally subject to the jurisdiction. In the cases of Captain Gambier and Admiral Palliser, the Court of King's Bench felt no difficulty in making the defendants personally liable in damages for the destruction of property in Nova Scotia and Labrador; see per Lord Mansfield in *Mostyn v. Fabrigas* (9). See further *Penn v. Lord Baltimore* (10), *Angus v. Angus* (12), *Cartwright v. Pettus* (13)—cited in

(1) 11 H. L., 642, at p. 650.

(2) L. R., 3 Eq., 409.

(3) L. R., 10 Eq., 131.

(4) 4 C. B. N. S., 334.

(5) 13 C. B., N. S., 470.

(6) 27 Beav., 425.

(7) 1 I. J., N. S., 40.

(8) 1 I. J., N. S. 319.

(9) 1 Smith's L. C., 623.

(10) 2 Tu. L. C., 837.

(11) 2 Hyde, 125.

(12) West. Rept. Hardw., 23.

(13) 2 Ch. Ca., 214.

the note to the leading case—*Khalut Chunder Ghose v. Minto* (1) and *Chintāman Nārāyan v. Mādhārāv Venkatesh* (2). The inconvenience to the plaintiffs' is an injury as purely personal as an assault, though aggravated by the injury to their land. In *Rylands v. Fletcher* (3), it is said that the defendants having a statutory authority, are not liable for the nuisance unless negligence be proved: in the present case the defendant's own evidence shows that they were guilty of negligence: but apart from this the case cited for the defendants do not support the argument. They show that the defendants can do nothing more than is expressly authorized by their Act of incorporation. Acts of this kind give special powers, and the Courts have always confined companies strictly to those powers—*Jones v. The Festiniog Railway Co.* (4). The defendants' act does not confer greater powers on the company than it would give a private individual; nor does it put the East India Company in the place of the Legislature to confer such powers: besides which it has not been shown that the sanction of Government was obtained for the erection of these particular forges. And even if that were the case, it would not justify the defendants in working the forges so as to cause a nuisance—*Broadbent v. The Imperial Gas Co.* (5) and *The Queen v. The Bradford Navigation Co.* (6).

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Cur. adv. vult.

MACPHERSON, J.—The plaintiffs', the owners and occupiers of a certain house and premises in Chandmaree Road, Howrah, complain of a nuisance caused by certain workshops, forges, and furnaces recently erected, and now used by the defendants. They say that the smoke, effluvia, and blacks, or smuts, emitted cause great annoyance and greatly injure the plaintiff's property, and diminish its value, and they pray that the defendants may be ordered to pay them damages for the injury done, and may be restrained by the injunction of the Court from continuing the nuisance.

(1) 1 I. J., N. S., 426.

(2) 6 Bom. H. C. R., A. C., 29.

(3) L. R., 3 H. L., 330.

(4) L. R., 3 Q. B., 723.

(5) 7 De G. M. & G., 436.

(6) 6 B. & S., 631.

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. The workshops, &c., complained of are in the immediate proximity of the plaintiffs' house, being in fact separated from it only by the Chandmarea Road. They were erected in 1867, and have been in use ever since the latter part of that year.

The defendants contend that the Court has no jurisdiction, as the suit is "for land or other immoveable property," and therefore ought to have been instituted in the Court of the district in which Howrah lies; that no nuisance was in fact ever caused; that if a nuisance had been caused and if the plaintiffs' could, under ordinary circumstances, have maintained a suit in respect of it, they are not entitled either to damages or to an injunction, because the nuisance has been caused by the defendants in the exercise with due care and caution of powers conferred upon them by the Legislature; and finally that, if the plaintiffs even had any remedy, they have lost it by their laches or acquiescence.

As regards jurisdiction, the defendant company being undoubtedly personally subject to the jurisdiction, as already decided by Markby, J., by reason of their carrying on business in Calcutta, I think that this Court can properly deal with the suit. The suit is not, as it seems to me, "for land or other immoveable property" within the meaning of s. 12 of the Letters Patent or s. 5 of Act VIII of 1859. It is a suit exclusively *in personam* where the person against whom relief is sought is within and subject to the jurisdiction, though the relief sought is in respect of acts done on land situated beyond the local limits of the original jurisdiction. (See *Chintaman Narayan v. Madhavrao Venkatesh* (1) and *Penn v. Lord Baltimore* (2), and the other cases there cited; see also *Khalut Chunder Ghose v. Minto* (3).)

If the smoke does enter the plaintiffs' house so as to constitute a nuisance, the plaintiffs' right of suit does not appear to me to be affected by the fact that some portions of the house were built only a year or two before the commencement of the nuisance. The whole of this land, both that on which the plaintiffs' house stands and that on which the defendants' workshops stand, originally belonged to the plaintiffs or those whom they represent.

(1) 6 Bom. H. C. Rep., A. C., 29.

(3) 1 L. J., N. S., 426.

(2) 2 Tu. L. Ca., 837.

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The land now held by the defendants was, in 1854, taken by Government from the plaintiffs, duly paid for, and made over to the defendants for the purposes of their railway. The plaintiffs' old family dwelling-house stood on the portion taken for the railway, and the plaintiffs' present house (then a mere bungalow with no upper story) was repaired and added to so as to make it suitable for the purposes of a new family house, and the Government was aware of its being so added to and repaired, and allowed the plaintiffs, as a matter of favor, to remain in possession of the old family house for an extra period of six months, until the new one was ready for occupation.

That was in 1855, when the northern part of the upper story was built. After the Cyclone in 1864, some further additions were made, both on the ground floor and on the upper floors,—some four new rooms on each floor were built, so far as I understand it. A year or two after these last additions, the defendants erected the workshops out of which the present litigation has arisen. Other works of different sorts, but none of them causing a nuisance such as that now alleged, were, from time to time, prior to 1867, carried on by the defendants on portions of this same ground. I can see nothing in this state of facts which injures the plaintiffs' right of suit, if a nuisance has really been committed.

That the smoke (and accompanying effluvia and smuts) arising from these workshops does constitute a nuisance in the legal sense of the term, is I think proved; i. e., I think it proved that the annoyance caused when the wind is in certain quarters is not alight or fanciful, but is such as materially interferes with the ordinary comfort of human existence in that house, and causes sensible injury to the value of the property of the plaintiffs. The plaintiff Rajmohun Bose appeared to me to put his case fairly and moderately in the witness box when detailing his grievances. He said, in effect, that the annoyance is excessive, and intolerable when the south wind blows, the smoke sweeping right through the house, and dirtying everything in it; that when the wind is from the east, the annoyance is very great, though not so excessive, that when the wind is from the west, he is not much inconvenienced; and that when the wind is from the north

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the plaintiffs do not suffer at all, except from the noise of the shops (which he says is always great and annoying, although it is not put forward in the plaint as one of the grounds of suit). Smoke, even if not accompanied by noxious vapours, may constitute a nuisance—*Crump v. Lambert* (1) ; and, considering the immediate proximity of these numerous chimneys to the plaintiffs' house, and the fact that the wind blows from the south, south-east, or south-west, for the greater part of the year, I do not doubt that an intolerable annoyance materially interfering with the ordinary comfort of the occupants of the house, and amounting to a nuisance, is created. That this was so before the alterations made in consequence of the representations the plaintiffs made in 1870 has been practically admitted by the defendants, however much they may deny it now. On the 27th of May 1870, the plaintiffs' attorney wrote to the defendants, saying, "the chimneys recently erected on the company's premises, opposite my client's property, throw out large volumes of smoke and soot to their great annoyance, and to that of the other inmates of the house. I have, therefore, to request you to cause the nuisance to be at once stopped by some arrangement by which the chimneys might consume their own smoke." Upon this, the defendants very properly replied (June 11th 1870) that, if the plaintiffs would point out the chimneys "from which annoyance arises," the company would adopt such measures as might be found practicable to remedy "the nuisance." The chimneys having been pointed out, and the plaintiffs' attorney, having on the 28th June, called attention to the fact that nothing had been done to remedy the evil, Mr. Denham, the district engineer at Howrah, replied (July 14th) for the defendant company, that steps were being taken to remedy the evil as much as possible. To a further letter of the plaintiffs, the defendants replied on the 10th of August, enclosing a copy of a letter from the district engineer at Howrah, adding, "from which you will observe that the company are endeavouring to remove the nuisance complained of, and hope to execute the work shortly." The letter of the district engineer enclosed, explained the nature of certain

(1) L. R., 3 Eq., 412.

extensive alterations which he was making, in order to remove the smoke "nuisance." As a matter of fact, the defendants then did make considerable alterations and additions with a view to abate the nuisance. They built an entirely new brick chimney, 60 feet high, raised an existing brick chimney by some 15 feet; raised some 10 iron forge chimneys from 38 feet to 53 feet; and added some new iron chimneys for carrying off smoke collecting in the roofs of the workshops. On these and other alterations the defendants expended a large sum, more than Rs. 5,000. On the 1st of July 1871, after these alterations had been completed, the plaintiffs again wrote, and complained that the nuisance remained unabated. The defendants replied (July 22nd), forwarding a copy of a letter from the superintendent of the carriage and waggon department, "from which it will be seen that steps have been taken to remove the cause of complaint against the smoke nuisance referred to." The letter of which a copy was sent, contained the following passage:—"I thought we had done all that was necessary, but it seems not since the south-east wind has blown, and Kurhmbattee coal used. No time shall be lost. I have put in hand four more chimneys to carry smoke from the fires, and two ventilating shafts to carry away smoke that may accumulate in the lanterns, &c." On the 23rd of August 1871, the plaintiffs again called attention to the fact that notwithstanding the Company's efforts, the nuisance had not been removed, and required the defendants, either to stop the works, or allow them compensation. The defendants (September 8th) answered "the carriage shops referred to have been in existence for the past fifteen years, and the smith's shop complained of, about four years, and no complaint was made until May 1870, since which time steps have been and are being, taken to abate any possible ground of complaint. Under these circumstances, the agency consider that your clients have no claim for compensation."

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The correspondence and the acts of the defendants are most important, not only as bearing out the truth of the plaintiffs' allegation that these works do cause a nuisance, but as disposing entirely of the defence raised on the ground of acquiescence or laches on the part of the plaintiffs. The defendants cannot

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now avail themselves of any such defence when we find them for more than a year after the plaintiffs' first complaint in May 1870, admitting that a nuisance did exist, and spending large sums of money in the attempt to abate it. The evidence adduced by the defendants as to the extent to which matters were improved by the alterations which were made was very weak and unreliable, as also is the evidence adduced by them to prove that the smoke does not in fact blow into the plaintiffs' house, or do it any damage. I think it clear that the defendants, admitting in 1870 that a nuisance existed, attempted to abate it; that these attempts were only partially successful, and that the nuisance still exists, though possibly in a somewhat diminished degree.

But it is said that even if the state of things amounts in law to a nuisance, the defendants are not liable in this suit, by reason of their position, i.e., because the nuisance has been caused by them in the reasonable exercise of powers conferred upon them by the Legislature. The land, on which the workshops stand, was taken by Government, under Regulation I of 1824, and Act XLII of 1850, for the purposes of the defendants' railway. All that the Government did or could do under these laws, was to pay for the land actually taken: for in Regulation I of 1824, there is no provision, such as is to be found in ss. 24 and 25 of Act VI of 1837, or in the English Statutes on the subject, for allowing compensation (beyond the mere value of the land taken) for damages in respect of adjoining land. It cannot be said that the Government simply, because in the exercise of statutory powers it has taken land on paying its value, can create a nuisance on it to the injury of the person from whom it was taken, and who remains in possession of adjoining land. The Government merely becomes the proprietor of the land appropriated, and acquires no higher rights in it than any other purchaser. In saying this, I am speaking of land taken by Government under Regulation I of 1824. The defendants' position is not improved or altered by the Statute 12 and 13 Vict., &c. 93 (Local), under which the East India Railway Company is incorporated for the purpose of making and maintaining railways in this country, nor by the agreement of the 17th August 1849, entered into (under that statute) by and between the Railway Company and the East

India Company. The general effect of the East India Railway Company Act and the agreement is no more than to authorize and direct the Railway Company to make and maintain such railway stations, offices, machinery, and other works and conveniences (connected with making, maintaining, and working the railways), as in the opinion of the East India Company may be necessary or expedient. The having such workshops, furnaces, and forges as these now complained of, may in itself be proper, and be within the powers of the defendant company: but it does not follow that they are entitled to have their workshops, furnaces, and forges in such place, or to use them in such a manner, as to constitute a nuisance to their neighbours. The decision of the House of Lords in *The Hammersmith Railway Company v. Brand* (1) does not assist the defendants. The nuisance in that case—vibration—was one which was unavoidable, and must necessarily be caused if the railway was to be used at all, and trains were to run on it with locomotives. So in *The King v. Pease* (2), the Legislature had authorized the nuisance, i. e., the use of locomotive engines in the manner in which, and place where, they were used. But in the present case, there is no sort of necessity for having the workshops where they are, and the nuisance might easily have been avoided. It may be necessary for the defendants to have such workshops; but it is in no degree a matter of necessity that they should have them on this particular piece of ground, or in any other place where they will cause a nuisance to anybody. The case is in fact similar in many respects to that of *The Queen v. The Company &c., of Bradford Navigation* (3), and Crompton, J., in his judgment really disposes of the matter in issue in this suit where he observes:—"Suppose a Company had power given them to erect necessities, no one could say that that power alone would extend to enable them to make a nuisance by the erection." The defence that the defendants are not liable, because the workshops are on their own land, and are worked with all reasonable care, is, I think, disposed of by the judgment of the Exchequer Chamber in *Bamford v. Turnley* (4), which shows that

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(1) L. R., 4 H. L., 171.

(3) 34 L. J., Q. B., 191; S. C., 6 B. & S., 631.

(2) 4 B. & Ad., 30.

(4) 31 L. J., Q. B., 286.

1872 when a man uses his land so as to create a nuisance it is no
 RAJMOHUN answer in an action for damages, to say that the acts complained
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In every respect therefore, in my opinion, the defence fails. The only remaining question is, to what decree the plaintiffs are entitled. As the nuisance is a continuing one, and further actions for damages may be brought if the nuisance is not abated, the proper course (see *Bathishill v. Reed* (1) for me to follow will be to give the plaintiffs a decree for Rs. 100 as nominal damages, and to order that an injunction do issue restraining the defendants, their servants, workmen, and agents from allowing smoke and smuts to issue from the workshops or chimneys, so as to cause nuisance or annoyance to the plaintiffs. I may add in the words used by the Master of the Rolls in making a similar decree in *Crump v. Lambert* (2). "I cannot make the order more precise, it is always a question of degree, and if the defendants can continue to carry on their works in such manner as to avoid any substantial issue of smoke, they will not violate the injunction. Whether they do so or not may have to be tried in another proceeding."

The costs (on scale 2) must follow the event up to and including the hearing, and liberty to apply will be reserved.

Judgment for plaintiff.

Subsequently to decree an application was made to suspend the injunction.

In accordance with the usual practice of the Court, the decree had been framed so that the injunction should come into force at once. The defendant Company now moved, upon notice to the plaintiff's attorney, for an order that the injunction be suspended for a period of three months. The application was supported by an affidavit of Mr. Pearce, the officiating superintendent of the carriage and wagon department of the East Indian Railway, who, after describing the various improvements and alterations projected by the defendant Company with a view

(1) 25 L. J., C. P., 290.

(2) L. R., 3 Eq., 414.

to the abating of the nuisance, went on to state that a period of three months would be required for completing these alterations and improvements: and that if the defendants were compelled to close their works while the alterations and improvements were in progress, considerable inconvenience would be caused to the public, and upwards of 200 men would be thrown out of employment.

The plaintiff, Rajmohun Bose, filed a counter-affidavit, to the effect that the defendant Company had already had upwards of two years to execute the necessary improvements, and that they had at the hearing of the suit contended that they had already done all that could possibly be done towards the abating of the nuisance.

The *Advocate-General* in support of the motion.—The decree expressly reserves liberty to apply. This reservation was clearly intended to enable the defendants to come before the Court. The plaintiffs have their remedy if the defendants do not obey the order of the Court. Should this application not be granted, the defendants will have to be guilty of contempt of Court without being able to help it. The Court will not place parties in such a position. It is true that the English Courts have refused to modify their decrees by altering the time mentioned in them. But all the English cases have this peculiarity, that in them the decrees contain a provision suspending their operation till a future date, thereby giving the defendants an opportunity for carrying out the orders of the Court, whereas in this case the decree was to operate at once, and no time was allowed for the defendants to abate the existing nuisance. Besides, the English Courts are not competent to alter their decrees, while in this country the Courts are differently constituted, and can review their own judgments. *Spokes v. Banbury Board of Health* (1) is an authority only apparently against me, and, if closely looked into, will be found to support my view. There an injunction was granted on the 6th of March, but execution was postponed till the 1st of July. The order not having been complied with by that

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(1) L. R., 1 Eq., 42.

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date, the plaintiff moved for a writ of sequestration for breach of the injunction. Wood, V. C., said at page 49 :—" These gentlemen were given from the month of March to the 1st of July to comply with the order. The order was made in the month of March but, as has been done in several cases, knowing that it requires time for matters of this kind to be carried into effect, the Court said they should not be bound to comply with the order until the 1st of July. * * * If these gentlemen had come before the 1st of July with a motion to ask for a longer time to comply with the order of the Court, it would have been a question, even then, whether the Court would have had power to enlarge the time mentioned in its own decree ; because it is not an interlocutory order. But, at all events, that might have been discussed. Instead of which, they quietly let the 1st of July pass by." Now it will be observed that in that case the Court did not grant the defendants any further time, on the grounds, firstly, that it had no power to alter its own decree ; and, secondly, that the defendants had done nothing during the time which was granted to them expressly to enable them to comply with the order of the Court—*Attorney-General v. Proprietors of the Bradford Canal* (1), *Attorney-General v. Leeds Corporation* (2), *Attorney-General v. Colney Hatch Lunatic Asylum* (3), and *Attorney-General v. Council of Borough of Birmingham* (4). All these cases are only apparently against me, while in reality they support my contention. Had the defendants, when the decree was made, applied to the Court to suspend its execution, no doubt the application would have been granted at once.

Mr. Kennedy, *contra*.—The cases relied on by the learned Advocate-General are not only apparently, but really and substantially, against him. The main argument of the defendants is that unless time is given they will not be able to comply with the orders of the Court. But this is totally at variance with the defence set up by them at the trial that they had already

(1) L. R., 2 Eq., 71.

(2) L. R., 5 Ch. App., 583

(3) L. R., 4 Ch. App., 146.

(4) 19 W. R., 561.

done all that could be done. How then can they ask the Court to give them time to do that which, if their defence was true, they had already done? It is contended that the reservation of liberty to apply was made with the view of enabling the defendants to come before the Court, and that the plaintiffs had their ordinary remedy. But from the language of the decree it is quite clear that the object of the reservation of liberty to apply was the benefit of the plaintiffs. The plaintiffs are the only judges in the first instance as to whether the defendants have complied with the order of the Court. If the plaintiffs felt that the order had not been complied with, they would have to come to the Court, and it is for the purpose of enabling them to do so that liberty to apply was reserved. The decree could not be in any other form.

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The *Advocate-General* was not called upon to reply.

MACPHERSON, J.—At the time I granted the injunction, I contemplated the company making alterations such as would make it possible for them to continue to use these workshops: and if I had been asked to do so, I should have granted them a reasonable time within which to make the necessary alterations. I shall therefore now give them time on their undertaking to use coke and to do every thing in their power to mitigate the nuisance and on their paying the costs of this application. They must use coke except when the wind is from the north, and they must do all that they possibly can to prevent annoyance to the plaintiffs. On those terms they may have three months from the date of the notice they gave of this application,—that is to say, they may have until the 9th of April.

Application granted.

Attorneys for the plaintiffs; Mr. *Mackertich*.

Attorneys for the defendant company: Messrs *Chauntrell, Knowles, and Roberts*.

FULL BENCH.

Before Sir Richard Couch, Kt. Chief Justice, Mr. Justice Phear, Mr. Justice Glover, Mr. Justice Mitter, and Mr. Justice Ainslie.

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WISE (DECREE-HOLDER) v. RAJNARAIN CHUCKERBUTTY (ONE OF THE JUDGMENT-DEBTORS).*

Limitation—Execution—Decree—Act XIV of 1859, s. 20.

Where a decree was given for arrears of rent against two persons, and one of them was afterwards declared on appeal to be liable for the rents for a certain period only, and execution was taken out against him only, held that the decree must be taken as a separate decree against each defendant for the portion for which each was declared to be liable, and consequently that execution proceedings against one would not prevent the law of limitation applying to bar execution against the other.

THE facts of this case were as follows :—

A suit was brought in 1853 by Mrs. Catherine Arathoon against Gourisunker Chuckerbutty and Mr. Gasper for arrears of rent of a putni talook for 28 years, from 1232 (1825) to 1259 (1853). It appeared that Gourisunker was the original proprietor, and had afterwards transferred the talook to Gasper. The Munsif gave a decree for the plaintiff, declaring Gasper to be liable only for the few months of 1259 (1853) during which he had been in possession, and Gourisunker for the rest of the arrears decreed. On appeal, the Principal Sudder Ameen of Nymensing, in 1856, modified that decree, and allowed the whole of the arrears claimed in the suit “against the persons in possession.” The decree, which had been subsequently transferred by sale to Wise, was then registered at Dowlutkhan in Backergunge for execution against Mr. Bagram, who had in the meantime become the representative of Gasper. In an execution proceeding, Bagram was declared by the Judge to be liable for the whole decree. On appeal by Bagram, the High Court in 1868, held that Bagram was liable for the year 1259 (1853) only.

* Miscellaneous Special appeal, No. 148 of 1872, from an order of the Officiating Judge of Mymensing, dated the 8th February 1872, reversing an order of the Officiating Munsif of that district, dated the 4th of October 1871.

In 1871 application was made by the decree-holder for execution against Gourirsunker's heirs (Gourisunker being dead), and against the property left by him.

Gourisunker's sons presented a petition objecting to the issue of any process of execution, upon the ground, among others, that no steps had been taken to execute the decree against their father for three years preceding the application. The Munsif allowed the execution to proceed, on the ground that the wording of the order of the High Court of 1868 was not clear, and that therefore, the decree-holder was not guilty of any laches. The Judge, on appeal, held that the decree was barred, and was not capable of being executed against Gourisunker's heirs. Wise appealed to the High Court. The case was heard before Couch, C. J., and Bayley, J., who, in consequence of the conflicting decisions in *Mohesh Chunder Chowdhry v. Mohun Lal Sircar* (1) and *Khema Debea v. Kumolakant Bukshi* (2), referred

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(1) 8 W. R., 80.

(2) *Before Mr. Justice Bayley and Mr. Justice Markby.*

KHEMA DEBEA AND OTHERS (DECREE-HOLDERS) v. KUMOLAKANT BUKSHI AND OTHERS (JUDGMENT-DEBTORS)*

The 3rd June 1868.

Limitation—Execution of Decree against several Defendants with separate Liability.

Baboo Issur Ohunder Chuckerbutty for the appellants.

The respondents were not represented.

The judgment of the Court was delivered by

MARKBY, J.—The appellants in this case are seeking to execute a decree, dated 21st March 1863, which declares that certain of the defendants in the suit, being six in number, should pay to the plaintiff Rs. 749-0-9; that certain others of the defendants, being five in number, should pay to the plaintiff Rs. 91-8-2; that certain others of the

defendants, being three in number, should pay to the plaintiff Rs. 60-8-6; and that the remainder of the defendants, being seven in number, should pay the sum of Rs. 280-0-9; in all Rs. 1,181-5, which, with costs in proportion, the defendants were to pay according to their respective shares.

The suit was brought by one of several persons jointly interested in land against his co-sharers, the ground of his action being that he had been compelled to pay the whole Government revenue due in respect of the land, and he now sought to recover from his co-sharers that which he paid in excess of his own proper share. The result of the suit was that he got a decree in his favor in the form stated above.

The obligation of the co-sharers in some way or other to satisfy this demand is well known, though there has been occasionally some difficulty and some misunderstanding as to the exact nature of the obligation, the mode in which it

* Miscellaneous Appeal, No. 470 of 1867 from a decree of the Judge of Rajshahye, dated the 7th June 1867, affirming an order passed by the Principal Sudder Ameen of that district, dated the 12th January 1867.

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the following question for the opinion of a Full Bench :—
“Whether in the case of such a decree as was sought to be

arises, and the mode in which it is to be enforced.

The mode in which the obligation arises is no longer of any importance as soon as it is ascertained what the obligation is, and the mode in which it is to be enforced; and both the points have, we consider, been finally settled by the practice and decisions of this Court in the following manner:—

1. That each co-sharer is bound to refund to the one who has paid the whole revenue, so much as he ought himself to have paid.

2. That this obligation is to be enforced by a suit against all the co-sharers in which the amount of their several liabilities is to be declared by the Court.

It can perhaps hardly yet be said to be fully ascertained how the rights of the parties are to be adjusted, if one of the co-sharers should be unable to fulfil his obligation, but no such question arises in the case before us. The above two propositions were recognized in the Full Bench decision in *Rambux Chittangeo v. Andhosoodan Paul Choudhry* (a).

Now, turning to the case before us, we, find that, in the year 1863, the plaintiff attached the property of one of the seven defendants who were ordered to pay Rs. 280-0-9. On the 27th November, the defendant, whose property had been attached, deposited in Court the sum of Rs. 368-0-2, being the above amount, together with the share of costs of this set of defendants and interest; and upon his doing this, the execution case was struck off the file, by which we understand it to be meant that the attachment was taken off, and the execution proceedings entirely put an end to. From that time, no further proceedings were taken by the plaintiff until the 21st November 1866, when he made an application for

the purpose of taking out execution against that batch of defendants who were ordered to pay Rs. 749-0-9. It was thereupon objected that execution of the decree was barred under s. 20 of Act XIV of 1859. The plaintiff in answer relied on the proceedings taken against the former batch of defendants, the last step in which was taken on the 27th November 1866. The Principal Sudder Ameen, however, to whom the application was made, gave his opinion in a very clear judgment that the decree was not a joint one against all the defendants, but a separate one against each batch, and that the proceedings against one batch had no effect whatever towards keeping alive the separate decrees against other batches; and he held the execution to be barred by limitation under the provision referred to. Upon appeal, the Judge of Rajshahye confirmed this decision. It now comes before us as a Miscellaneous Appeal, and we also think the Principal Sudder Ameen was right.

It appears to us that the language of the decree is clear. It directs each batch of defendants to pay a certain sum of money, and there is not a single word in the decree which would lead us to suppose that it was the intention of the Court which passed the decree to impose a joint liability upon all the defendants for the whole amount.

It is said that the decree must be considered as creating a joint liability, because the plaintiff has a right to hold all the defendants jointly liable for the amount which he has paid in excess of his share; but as appears from what has been already stated, this argument is directly opposed to the established law and practice of this country. In such a suit as this, though all the sharers must be sued together, yet it is the business of the Court by its decree to apportion

(a) Reference from the Judge of the Small Cause Court of Krishnagur, dated 15th April 1867.

executed in this case, proceedings in execution against one of the defendants are sufficient to prevent the law of limitation applying to process of execution against the other."

Mr. C. Gregory, for the appellant, contended that there was but one decree. The same decree cannot be alive and in force as against certain persons and inoperative as against others. The question now raised was decided in *Mohesh Chunder Chowdhry v. Mohun Lal Sircar* (1). There is no difference between that case and this. In *Khema Deba v. Kumolakant Bukshi* (2), the Judges proceeded upon the assumption that there were four separate decrees.

Baboo Boikantknath Doss for the respondent.—There are two decrees here; see *Khema Deba v. Kumolakant Bukshi* (2), and also the passage from the judgment in *Stephenson v. Unnoda Dassas* (3), which is quoted in *Mohesh Chunder Chowdhry v. Mohun Lal Sircar* (1). Execution against one of the judg-

the liability amongst the shareholders according to their respective shares, and not to give a joint decree against all. This was done as far as it was necessary to do so in the present case.

We have been much pressed with a case of *Mahesh Chander Chowdhry v. Mohun Lal Sircar* (a), decided by L. S. Jackson and Hobhouse, JJ. There is no doubt, great similarity between that case and the present, and had we differed from those two Judges or any principles of law, we might have thought it right to send the case before a Full Bench. But we do not consider that upon any principles of law involved in this case there is any difference of opinion whatever. The Judges in that case thought that the decree before them was joint and several, and considered that the joint liability of all the defendants was kept alive by proceedings against any single one. We do not question this, but in our opinion the decree before us is not a joint decree as against

all the defendants. It, in fact, comprises four decrees against four separate batches of defendants, and though, as between defendants comprised in the same batch there is a joint liability for the amount which that batch has to pay, yet, as between the members of different batches, there is no common liability. Consequently, we consider that the proceedings in execution against one batch of defendants would not have any effect in keeping the rights of the decree-holder alive as against defendants who belonged to other batches, and no proceedings having been taken within three years to execute the decree against the batch of defendants to which the respondents belong, the rights of the decree-holder under this decree is, as against these defendants, barred by limitation.

The appeal is dismissed with costs.

(1) 8 W. R., 80.

(2) *Ante*, p. 259.

(3) 6 W. R., *Mis.*, 18; see p. 21.

(a) 8 W. R., 80.

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ment-debtors is not enough to keep the decree alive against the others.

Mr C. Gregory in reply.

The judgment of the Full Bench was delivered by

Couch, C.J. (after reading the question).—The suit appears to have been brought to recover arrears of rent for 28 years, and it appears that one of the defendants Gourisunker had been in possession up to a certain time, and that then the possession had been transferred by sale and purchase from him to Mr. Gasper, and there was no joint liability. Each person was liable for the rent for the period during which he or she had occupied, and the decree was, in the first instance, made by the Munsif, apparently, in that form. The Principal Sudder Ameen appears to have modified that on an appeal, and to have declared that the rent was to be allowed for the whole time against the persons in possession. That was in reality the same thing, but leaving the period for which each would be liable to be determined in the execution of the decree. Subsequently, the High Court appears from the proceedings to have declared that that was so, and Mr. Bagram, who represented Mr. Gasper, was declared to be separately liable for the rent of 1259 (1853). Although these persons were joined in the suit in this way, yet we must treat the decree as what it must have been by law, a decree against one person for the rent of one period, and a decree against the other person for the rent of another; and I think such a decree as this, although it is on one piece of paper, is in fact two decrees, a separate decree against each for the sum for which each is liable. When we come to apply to that the terms of s. 20 of the law of limitation, there is really no difficulty; the decree is to be kept in force against each, and to be treated as a separate decree against each, in such a case as this, as it would in the case of persons sued for contribution, because it is a separate liability, and each is liable only for his own share. I think that, although the decree is made in one suit, it is in reality and substance a separate decree against each for the portion for which each is declared to be liable.

We must answer to the question which is put to us that, in such a case as this, the proceedings are not sufficient to prevent the law of limitation applying to the other defendant.

The case will go back to the Division Bench with that answer.

ORIGINAL CIVIL.

Before Mr. Justice Macpherson.

HURRONATH MULLICK AND OTHERS v. NITTANUND MULLICK
*Evidence Act (I of 1872), ss. 13, 21, cl. 1, and 32, cl. 7—Relevant Fact—
 Evidence of Family Custom—Statement in writing by a Party to the Suit who
 is dead—Admission.*

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 Jan. 27 &
 Feb. 5.

In a suit to establish the existence of a family custom, the plaintiffs offered in evidence a deed containing a recital that the custom of the family was as alleged in the plaint, and a covenant to do nothing contrary to it. The deed was executed before action brought by the present plaintiffs, and also by a plaintiff who had died since the institution of the suit and, as the plaint alleged, by "a considerably majority" of the family, but the defendant was not a party to it. *Held*, that the deed was admissible as evidence on behalf of the plaintiffs, though they could themselves be called as witnesses: but that, though admissible, the custom as against the defendant must be proved *alimdo*.

The plaintiffs and the defendant in this case were descendants of two brothers who, some two hundred years ago, had established certain idols. These idols had, for many years been kept up, and their worship maintained by the various families descended from the original founders, each of these families in rotation being entitled to the custody of the idols and to a *pallah* or turn of worship. It was alleged in the plaint that the majority of the descendants of the founders had always lived in Calcutta, and that, by the custom prevailing in the family, the idols could not be removed from Calcutta, but must be kept in the house in Calcutta of the person who for the time had the *pallah*. The defendant, on his *pallah* commencing last October, proposed to remove the idols to his house at Bhagmuree, out of Calcutta, whereupon the present suit was brought for the purpose of having it declared that the custom alleged in the plaint prevailed in the family, and of obtaining an injunction to

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restrain him from doing so. An *interim* injunction had been granted by Pontifex, J., and the suit now came on for final disposal,

It was proposed, on behalf of the plaintiffs, to put in as evidence of the alleged custom a certain deed of agreement under seal, executed in June 1871 by the plaintiffs and "a considerable majority" of those entitled to *pallahs*, in which after reciting that the custom of the family was as alleged in the plaint, they covenanted with one another not to remove the idols from Calcutta during their respective *pallahs*. The defendant was not a party to this deed, and one of the plaintiffs, Shama Churn Mullick, who had joined in the execution of the deed, had died since the suit was instituted.

Mr. *Kennedy* and Mr. *Lowe* for the plaintiffs.

Mr. *Woodroffe* and Mr. *W. Jackson* for the defendant.

Mr. *Kennedy* for the plaintiffs, contended that the deed was admissible under the Evidence Act, I of 1872, ss. 13 and 32, cl. 7. Shama Churn was a party to the suit, and he is now dead. This must be taken to be a statement by him relating to a transaction by which a custom was recognized. It is clearly *ante litem motam*. [MACPHERSON, J.—You may perhaps put in the recitals as being a statement by one of the plaintiffs who is now dead, but the only effect of that will be that what he states in the plaint will then appear as evidence given in the box.] It will be for the Court to give what weight it pleases to it, but I submit that the whole deed is clearly evidence.

Mr. *W. Jackson*, for the defendant. objected to the reception of the deed in evidence.

Cur. adv. vult.

The following was the judgment on this point :

MACPHERSON, J.—Besides calling some of the plaintiffs and one of their priests to prove that the right to remove the idols has never before been either exercised or claimed, Mr. *Kennedy* proposed to put in a deed of agreement under seal, executed in June 1871, by (as the plaint says) "a considerable majority" of those

entitled to *pallahs*, including the plaintiffs. That deed recites the custom of the family to be as now alleged in the plaint ; and those who signed it covenanted with one another not to remove the idols from Calcutta. The defendant was not a party to this deed, and its reception to evidence was objected to on his behalf by Mr. Jackson. I said, at the trial, that I would receive the recitals, as being a statement in writing made by one of the plaintiffs, Shama Churn Mullick, who might have been examined as a witness had he not died since the suit was instituted. I thought that the recitals were, under s. 13 of the Evidence Act, read together with s. 32, cl. 7, receivable as statements made by Shama Churn, he being now dead, Mr. Kennedy, however, pressed for the admission of the whole deed, together with evidence of the circumstances under which it was executed. He relied on s. 13 of the Evidence Act, and contended that as the question is as to the existence of a right or custom, the execution of this deed is a "relevant fact," as being either a "transaction by which the right or custom in question was * * * * recognized and asserted" under cl. (a) of s. 13, or as being "a particular instance in which the right or custom was * * * * recognized" under cl. (b). At first, I thought the deed inadmissible, except as a statement made by Shama Churn, the defendant not being a party to it, and being in no way bound by it. And it certainly is rather startling to find that when a set of plaintiffs come into Court claiming a right by custom as against a defendant, a declaration by them among themselves (but behind the back of the defendant) that they have the right, and a covenant to do nothing contrary to it, are admissible as evidence on their behalf. Such an assertion of right, it at first sight appeared to me, could be placed no higher than an "admission," which (s. 17) is defined to be "a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact," made by a party to the proceeding, and which is ordinarily (s. 21) not admissible on behalf of the person who made it. But by cl. 1 of s. 21, "an admission may be proved, by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under s. 32." And farther considera-

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tion of the matter has made me come to the conclusion that I must admit this deed, as being in strictness admissible on behalf of the plaintiffs generally : for in admitting the recitals as a statement made by Shama Churn Mullick, I held them to be relevant under s. 32 : and it almost necessarily follows that I must admit the deed on behalf of the plaintiffs, though they can themselves be called as witnesses, and though the deed amounts merely to a statement by them of their own view of their case.

Practically, however, it makes little difference whether the deed, or any portion of it is admitted or rejected. Whether it is or is not evidence under the new Act, it is manifest that a mere statement by the plaintiffs and others, forming "a considerable majority" of those interested, a few months before action brought, that they have this right, and will uphold it, is worthless, as against a third party, as evidence that they do in fact have the right which they assert they have. It is none the less worthless because made, as in the present instance, on the occasion of a settlement among themselves of questions and difficulties which had arisen. In my opinion this deed, when admitted, leaves the plaintiff's case exactly where it was : for it shows no more than that, whereas the plaintiffs, in October 1872, filed the plaint now before me, asserting that a certain right exists and praying that the defendant may be restrained from infringing it, they in June 1871, signed a deed in which they (as amongst themselves) asserted this same right and bound themselves to respect it. Whether, as against the defendant, they have or have not the right claimed remains unaffected by the deed, and must be proved *aliunde*.

Attorneys for the plaintiffs : Messrs. *Beeby and Rutter*.

Attorney for the defendant : Mr. *Oliver*.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Markby.
PROSUNNO KOOMAR GHOSE (DEFENDANT) v. TARRUCKNATH SIKKAR (PLAINTIFF).

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Hindu Law—Will—Gift absolute to Widow—I in inheriting of Sons.

A Hindu died, leaving a widow, two infant sons, and a daughter, and having made a will in English, of which the following is the material portion:—"I give, devise and bequeath unto my wife *L D* and her heirs and assigns for ever all my real and personal estate and effects, and do appoint my said wife sole executrix of this my will." *Held* (reversing the decision of Macpherson, J.) that the wife took an absolute estate with full power of alienating the property, and not merely as trustee and manager for the infant sons.

See also
 14 B L R 226
 11 B L R 292
 11 B L R 466

It is not necessary that there should be an express declaration of the testator's desire or intention to disinherit his sons if there is an actual gift to some other persons expressed in clear and unequivocal words.

APPEAL from a judgment and decree of Macpherson, J., dated the 5th of June 1872.

The facts of the case appear fully in the judgment of

MACPHERSON, J.—The subject of dispute in this suit is certain property which originally belonged to one *Hurronundo Sirkar*. The plaintiff and the defendant are both grandsons of this *Hurronundo*, but, unfortunately, for the defendant, according to Hindu law, occupy very different positions, the plaintiff being the son of a son, while the defendant is the son of a daughter.

Hurronundo Sirkar died in 1833, leaving a widow *Luckymoney Dossee*, and two sons *Shamachurn* and *Woomachurn*, and a daughter *Raymoney*. *Shamachurn* died in 1859 without issue, but leaving a widow named *Rampreosi Dossee*, who died in 1855 or 1856. *Woomachurn* died in 1854, leaving one son, the plaintiff *Raymoney*, the daughter of *Hurronundo*, is still alive, and the defendant *Prosunno Coomar Ghose* is her son.

Supposing, *Hurronundo Sirkar* to have died intestate, so that his son *Shamachurn* and *Woomachurn* succeeded to his property, according to the ordinary rule of Hindu law the whole estate would now belong to the plaintiff, to the exclusion of the defendant: for *Shamachurn* and *Woomachurn* would have

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taken in equal shares. On the death of Shamachurn, his widow Rampreosi would have taken a widow's life-interest in his share of the estate; upon her death his mother Luckymoney would have succeeded; and on Luckymoney's death the share would have gone to the present plaintiff as the next heir of Shamachurn. But the real state of the case, however, is that Hurronundo Sirkar died leaving a will, and the defendant Prosunno Coomar Ghose contends that under that will his whole estate vested absolutely in Luckymoney, to the entire exclusion of his children, and that Luckymoney Dossee in her lifetime made a gift to him (the defendant) of the six-anna share of the family dwelling-house, which is the subject of this suit. There is no doubt that the question which has been raised is one of great importance to Hindus, as bearing upon the question of the principles upon which the Courts ought to act in construing wills made by Hindus.

Hurronundo Sirkar made a will in English, which was apparently prepared by an English attorney, but which is signed by the testator himself in Bengali. It consists of only a few lines, and the following is the material part of it:—"I give, devise, and bequeath unto my wife Sreematty Luckymoney Dossee and her heirs and assigns for ever all my real and personal estates and effects, and do appoint my said wife sole executrix of this my will."

Luckymoney Dossee, in February 1834, obtained probate of this will from the Supreme Court, and from that time onwards until her death in October 1858, she had the control and management of the property left her by her husband, and dealt with it as if it was her own. At the same time, however, her sons Shamachurn and Woomachurn, who were young children at the time of the death of their father, always lived with her, and substantially had the enjoyment of this property along with her; and on the evidence of the defendant Prosunno Coomar himself, it appears that Shamachurn and Woomachurn, after they attained to years of discretion, used to assist her in the management of the property, although everything was done in her name.

Luckymoney, on one or two occasions, sold portions of the Property which belonged to Hurronundo's estate; and on these

occasions the conveyances seem to have been made by her. One of these conveyances, a Bengali bill of sale, dated the 3rd of February 1849, has been put in, and in that she states that she sells the property, her husband having given a "*torneynima* will" in her name. While this bill of sale was given by Luckymoney as being the person having the right to convey, it is to be noticed (and it is a material fact) that Shamachurn and Woomachurn, the two sons, who were the natural heirs of Hurronundo, sign the conveyance as witnesses, a proceeding well understood among natives as indicating that these sons, being parties having an interest, gave their consent to the sale being made.

Shamachurn's widow Rampreosi having died, we find that very shortly thereafter Luckymoney executed a deed of gift to the defendant Prosunno Coomar Ghose of the property which is the subject of this suit. That deed of gift is dated the 18th of October 1856, and in it the property is described as being property "which was given (to me), and has been held and enjoyed by me up to this time." Two or three months before her death, Luckymoney made a will, which is useful as showing what she considered to be her position with reference to this property. She says:—"My husband, the late Hurronundo Sirkar, having made a will on the 22nd day of September of the English year 1833, granted all his moveable and immoveable property to me. Thereafter, upon his death, I, having obtained the whole of his property by virtue of his will, am possessing and enjoying the same from that time up to the present as owner of the right of gift (and sale thereof), and I have alienated some of these properties." Then she says that she has already given out of the properties granted by her husband a six-anna share of the family house to the defendant Prosunno Coomar Ghose by deed of gift, and she goes on to bequeath the remaining immoveable properties which she then had, and her entire moveable property to her son's son Tarrucknath Sirkar. She then proceeds to appoint the defendant Prosunno Coomar Ghose as executor and manager during the plaintiff's minority, and to declare that the whole estate should go to Prosunno Coomar Ghose absolutely, in the event of the plaintiff dying

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a minor without issue, or of his renouncing the Hindu religion.

This will confirms the view that Luckymoney herself considered that she was absolute owner of the property, and had the right to dispose of it at pleasure; and I have no doubt the whole family thought the same thing. Thus we find that, during the minority of the plaintiff, his mother filed a bill in equity in the supreme Court against the present defendant Prosunno Coomar Ghose, the object of which was merely to have Luckymoney's will construed, and to have an account of her estate taken, no question being raised in that suit as to the rights of Luckymoney under Hurronundo's will, or as to the rights of the plaintiff as heir of Hurronundo, or of Shama-churn. These proceedings are only material now, as showing that some years ago the plaintiff's mother and guardian did practically treat Luckymoney as having a good and absolute title under the will to the property of Hurronundo Sirkar.

The plaintiff attained the age of eighteen years, as he states in his plaint, sometime in the year 1871; and, taking advantage of his exemption from the ordinary provisions of the law of limitation by reason of his minority, he now seeks for a declaration that Luckymoney did not, under the will of Hurronundo Sirkar, become the absolute owner of the property, and that she had no right to alienate any portion of it, or to give to the defendant the six-anna share of the dwelling-house which she gave by the deed of the 18th October 1856. The plaintiff's contention, in fact, is that although, according to the literal meaning of the words used in Hurronundo's will, the whole estate of Hurronundo Sirkar was given to Luckymoney absolutely, still, on the proper construction of the will, that is to say, if the will be construed not with reference to English law, but with reference to Hindu law, and to the habits and customs of the Hindus, the Court ought to hold that the will gave her no absolute interest, but merely appointed her to be trustee and manager of the estate for the benefit of the sons of the testator.

I think that the plaintiff's contention is right. Considering that the will is the will of a Hindu; considering that he had at that time two infant sons; and considering that there is

no expression or indication anywhere of a desire to disinherit his sons, and that there was no reason why he should desire to disinherit them. I think I must assume that he did not mean to disinherit them, and that the will must be read as merely making over the property to the wife to be held by her in trust for the infant heirs. I agree with Phear, J., in what he says in his judgment in the case of *Rooploll Khettry v. Mohima Churn Roy* (1), (decided on the 12th September 1870). I think

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(1). *Before Mr. Justice Phear.*

ROOPLOLL KHETTRY AND ANOTHER
v. MOHIMA CHURN ROY.

The 12th Sept. 1870.

KISTO CHUNDER DASS, a Hindu, died in March 1864, possessed, amongst other property, of a house No. 8/12, in Rajah Gooroodas' Street, and leaving him surviving three sons, Radhanath Dass, Bonomally Dass, and Troyluckonath Dass. In February 1862, Kisto Chunder made a will, of which he appointed Radhanath executor, and which was to the following effect:—

“ I, Sree Kisto Chunder Dass, execute this *willndma*, or testamentary instrument, to the following purport or effect:—I being very ill, and my body being inconstant and mortal, knowing this, in my sound mind I make my will. The whole of my estate, both real and personal, and the existing shop which I have, you are the proprietor and owner of the whole, and I have appointed you my executor, that is to say, my attorney.

You will supply the expenses of the household, and will supply the food and raiment of the family, and carry on the existing shop; and will perform as usual the religious observances of the family, and you will further perform the worship of Eshur Sreedhur Thakoor in the manner in which it is now being done, and you will perform my *shrddhas*, &c. The whole of the religious acts, and the protection of all the real and the personal estate, will be attended to by you, and you will conduct the existing shop, and collect all dues and pay all debts. All power

is vested in you. Whatever you do, I agree to; no one else has any power left to him, and I am making my will in sound mind. If, after my decease, any other of my heirs object to this will, the same is inadmissible and void, and you will pay the undermentioned legacies to the undermentioned parties:—

Sree Ramkanaye Dass, station Churuckdangah. Particulars of legacies.” (After the witnessing clause, came a list of the legacies.) “Thakoor Soor, &c., Rs. (25) twenty-five; purohit or family priest, Rs. (10) ten. You will give to my eldest daughter, Sreemutty Rane Dass, Rs. (200) two hundred. You will give to my second daughter, Sreemutty Womasoondore Dass, Rs. (150) one hundred and fifty. You will give to my youngest daughter, Sreemutty Teencowrie Dass, Rs. (150) one hundred and fifty.”

After Kisto Chunder's death, Radhanath applied for probate of his will, but a *caveat* was entered by Bonomally. An arrangement was then come to between the two brothers, whereby it was agreed (*inter alia*) that, if Bonomally would withdraw his opposition, Radhanath should pay him Rs. 3,000 and the costs incurred by him; that Bonomally should release his claim against the house No. 8/12; but that, notwithstanding the devise to Radhanath, the house should remain the joint property of the three brothers. The release by Bonomally was drawn up and engrossed, and a decree by consent passed in favor of Kisto Chunder's will. Radhanath, however, paid only Rs. 1,300 of the Rs. 3,000, and

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it impossible to assume that a Hindu means to disinherit his only sons when there is no express declaration of his desire or

the release in consequence was never executed. In August 1866, Radhanath died, leaving a son, Meghnath Dass, and his two brothers, Bonoinally and Troyluckonath, him surviving, and having first made a will, the material portions of which were as follow :—

“I, Sree Radhanath Dass, inhabitant of Rajah Gooroodass' Street, in the city of Calcutta, endite this 'will putro' to the following effect :—

For the last three months I am ill and laid up in bed. We cannot tell what may happen to the human being at any time, consequently I, of my own desire, write this 'will putro,' appointing Sreeman Troyluckonath Dass, the youngest brother, my executor, that is 'torney,' as set out in the following clauses. You, brother, will perform all the business accordingly :—

1st Clause.—The *saba* (service, worship) of my ancestral Sree Sree Eshur Sreedhur Thakoor, which is in my ancestral *batee* (house, premises), will be performed as has been done theretofore.

2nd Clause.—My (2) two widow sisters, Sreemutty Ranee Dassee and Sreemutty Woomasoonndoree Dassee, will remain as they now are in my ancestral *batee*. They will get food and raiment as they now get from my family. No person will be able to oppose the same. Should they not agree with my youngest brother, then they will monthly get Rs. (6) six for their food and raiment, that is, each one of them Rs. (3) three a month.

3rd Clause.—With the rent of the tenanted *batee* which is in the *kheerkee* (rear or hind portion of house) of the ancestral dwelling-house, the *saba* of Sree Sree Eshur Sreedhur Thakoor will be performed, and the tax of the *nij batee* paid; and from the proceeds of the gardens situated in Belgachia, in Zillah 24-Pergunnahs, the family expenses will be paid.

4th Clause.—There is in Rajah Gooroodass' Street the ancestral tenanted *batee* No. 8/12 recently purchased in the name of my father, deceased, and newly built, from the rent of which the tax should be paid first; and whatever money remains, the whole of it will be paid towards the family expenses and other disbursements set out in the following clauses, excepting which no other expense will be incurred as a charge therefrom.

7th Clause.—The white thread trade, which was formerly carried on in my own name with Sree Ramkanaye Dass and Sree Troyluckonath Dass has been closed a long time ago, and each party has taken his own share. Subsequently a trade is now going on with Sreejoot Oroon Chunder Ghose in Burra Bazar. The debts and credits you will pay, and realize all.

8th Clause.—Before this my second brother brought an action in the High Court against us, which, having been subsequently settled with him amicably, I gave Co.'s sicca Rs. (1,300) thirteen hundred to the brother, and paid his vakeel costs in full. Co.'s Rs. (2,000) two thousand are still due to him. Should you be unable to pay the same from other means, then you will either mortgage or sell the new *batee* No. 8/12 in Rajah Gooroodass' Street, and pay his Rs. (2,000) two thousand, and take a release written by him.

10th Clause.—I have gradually borrowed from Sreemutty Bindoobasini Dassee Co.'s Rs. (1,100) eleven hundred, which said rupees I have paid towards the debt of the present shop, and for other debts and for the expenses of the illness. Should you be unable to pay the rupees from other means, then you will either mortgage or sell the *batee* No. 8/12 in Rajah Gooroodass' Street, and pay the debt to the said Dassee.”

Troyluckonath applied for probate of this will, the application being opposed

intention to do so, and when no cause is shown why he should have such a desire or intention. A recent decision of the Privy

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by Megnath, the son of Radhanath, but the Court, on the 13th May 1867, decreed in favor of the will, and granted probate to Troyluckonath.

Pending this suit, and prior to decree, Bonomally and Megnath, on the 26th March 1867, mortgaged their two-thirds share in the house No. 8/12, Bajah Gooroodass' Street, to the defendant, and default having been made in re-payment of the mortgage-debt, the defendant, on the 6th January 1868, obtained a decree for payment thereof, or sale of the mortgaged premises. Before this, on the 17th August 1867, Troyluckonath mortgaged the house to the plaintiffs to secure the re-payment of Rs. 6,500 which he had borrowed from them for the purposes of Radhanath's will. Upon his failure to repay the money at the time stipulated, the plaintiffs instituted a suit for foreclosure, and obtained a decree absolute for foreclosure on the 15th July 1869. Afterwards, on the 9th September 1869, the plaintiffs obtained a decree for possession, and at the time of this suit were in possession of the premises.

The suit was brought by them against the defendant, the mortgagee of two-thirds of the house. In their plaint the plaintiffs alleged that the defendant's mortgage and decree threw doubt and suspicion on their title, and that their possession was disquieted thereby, and would be still further disquieted by the intended sale by the defendant under his decree. They, therefore, prayed for an injunction to restrain the defendant from proceeding to a sale, and that he might be compelled to enter up satisfaction of his decree, and to bring his mortgage into Court for cancellation.

Mr. Kennedy and Mr. Pigford for the plaintiffs.

Mr. Woodroffe and Mr. Evans for the defendant.

The judgment of the Court was delivered by

PHEAR, J.—Mr. Kennedy put the case before me as if it belonged to that class in which a Court of Equity will interfere in favor of a plaintiff by causing deeds or documents to be delivered up and cancelled, in order that they may not be used to the prejudice and danger of the plaintiff, and form, as it is said, a cloud on his title. The principle which governs the Court in such cases is sometimes expressed in the phrase "*quia timet*," and these words sufficiently indicate the nature of the mischief for which the remedy is given. I may expound them by saying the Court furnishes its aid in cases of this kind to remove out of the way instruments which really are void or inoperative, for fear they might at some future time be used to the prejudice or injury of the plaintiff, when the necessary evidence sufficient to invalidate them may be lost. It appears to me that the present case does not fall within that class. There is here an existing conflict between the parties of a substantial character, and I think this suit is in no sense a *de bene esse* proceeding. It is, in truth, one with which we are exceedingly familiar on the other side of this Court. A plaintiff declares that he is in possession of property, the subject of the suit, and that he is rightfully entitled to it: and he complains that the defendant sets up a hostile title, and under cover of that title is committing some overt act of wrong against him, the plaintiff; and on this ground the plaintiff asks for a declaration of right against the defendant. In the present case the plaintiffs seek to have the document delivered up and cancelled. They do not precisely ask here for a declaration of right, but they pray that the defendant may be restrained by injunction from proceeding to sell the

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Council in the case of *Raj Lukhee Dabea v. Gokool Chunder Chowdhry* (1) has some bearing on the question.

house and premises in suit, and also that he may be compelled to bring his mortgage-deed into Court and have it cancelled. It appears to me in this state of things that it is incumbent on the plaintiffs to prove first their possession, and next the title on which they rely.

I think they have sufficiently made out their possession. It seems to me on the evidence pretty clear that the plaintiffs are now in enjoyment of the rent and profits of the house which is the subject of suit.

Then comes the question of title. I may shortly say, the plaintiffs allege they got this property by a mortgage, carried to foreclosure, from Troyluckonath; that Troyluckonath made the mortgage to them by virtue of powers which he obtained as executor of and under the will of Radhanath Dass, and that the mortgaged property had been devised to Radhanath by his father Kisto Chunder, who had himself originally acquired it. Now, assuming for the moment that Radhanath became the actual proprietor of this house by virtue of his father's will, the powers which Troyluckonath pretended to exercise came to him solely through the will of Radhanath; and this will runs in the following terms:—(His Lordship read the first three clauses of the will, and continued).—Then comes the 4th clause, and this no doubt distinctly gives authority to the executor to deal with this particular property, No. 8/12, for the specific purposes afterwards mentioned in the will. It does also, however, contain this declaration, namely, that "the whole of the proceeds will be paid towards the family expenses and other disbursements set out in the following clauses, excepting which no other expense will be incurred as a charge therefrom." Afterwards the 8th clause

says to the executor:—"Should you be unable to pay the same (i.e., Rs. 2000 to the testator's second brother, Bonomally) from other means, then you will either mortgage or sell the new *batee*, No. 8/12, in Rajah Gooroodass' Street." Again, the 10th clause gives power to the executor to mortgage the same for the purpose of obtaining funds to pay the debt of Rs. 1,100 to Bindoobasini. The two passages I have now read thus give distinct authority to Troyluckonath, if necessary, to mortgage the premises which are the subject of suit, to secure a sum in the aggregate amounting to Rs. 3,100. The plaintiff's mortgage is for a much larger sum than this (I think for Rs. 6,500). If, therefore, Troyluckonath's powers were limited by these two passages, I think it would have been *ultra vires* on his part to execute the plaintiff's mortgage. There is, however, another clause which I have not yet mentioned, i. e., the 7th, and I think Mr. Kennedy rightly attached to this considerable importance (*reads*). Mr. Kennedy argued that this was a direction to the executor to pay the testator's debts, at any rate the debts of this particular concern, out of the testator's estate. Now, if this be so, I am not disposed to say that the law which this Court administers in regard to the estates of Hindus would oblige a purchaser from the Hindu executor to see to the exact amount of the debts which the testator directed him to pay, or even to make enquiry whether any such debts actually existed. It would, I think, be inconvenient in practice if the purchaser was obliged to look further than the will itself; and if that will gave the executor or trustee the authority to pay debts out of the estate, I should be disposed to say the purchaser might safely rely on the executor's power to convey; and therefore I think Mr. Kennedy's argument on the effect of this 7th clause is good to the extent of proving that Troyluckonath under this will had

(1) 13 Moo, I, A., 290; S. C., 3 B. L. R. P. C., 57.

As I am of opinion that Luckymoney was merely a trustee or a manager for her sons, the question arises whether Wooma-

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power to make the mortgage to the plaintiffs which is the basis of the plaintiffs' title.

But then comes the question, which is of cardinal importance in this case, and which I think both sides have considered to be critical i.e. had Radhanath power to make the will, which I have just read and referred to, so as to give Troyluckonath the power to sell or dispose of the whole property, which is the subject of suit? If he had, then he got his power from Kisto Chunder by the will of 1862. Now, this will is as follows:—(His Lordship read the will as set forth above, and continued). It is contended that this will gives the whole proprietary right in the property, which is the subject of it, to Radhanath. It is directed to Radhanath, and the first clause runs as I have read. But if this will is to be construed in the way the plaintiff asks to have it construed, it has the effect of disinheriting two out of the three of the testator's sons, without a single word expressive of his intention to do so. It seems to me going a very long way to suppose that a Hindu father would disinherit two of his sons without assigning a shadow of a reason or motive after a fashion of this sort. And it is remarkable that the testator makes substantial legacies to each of his three daughters, while he does not even mention in any way the second and third sons, Bonomally and Troyluckonath. Now, not a single suggestion has been made from beginning to end of a reason why the testator should disinherit these two sons, or why he should give the whole property to his eldest son, substantial legacies to his three daughters, and yet leave Bonomally and Troyluckonath without the slightest mention. I think a little closer looking at the will clears up the mystery, and shows that he did not disinherit any of his children at all. It is true he has given his whole estate, real and personal, to his eldest son, as mentioned; but what is

he to do with it? Not to apply it to his own purpose: he is not left the freedom of a proprietor: he is told to supply the expenses of the household, food, and raiment of the family; to carry on the existing shop; to perform the religious observances of the family as usual; to perform the worship of Eshur, &c.; to perform the testator's *shraddh*; and one or two of these directions are repeated a second time. I have not the smallest doubt that the testator meant that all his children should take the benefit and advantage of this property as an united Hindu family; and so far as he constituted Radhanath *malik*, it was as trustee for himself and the other members of the joint family.

And what have been the facts since the death of Kisto Chunder in this respect? Indisputably the members of the family have lived together as a joint family, even during the time when the contract was going on between Bonomally and Radhanath in respect of this very will. We have it in evidence, and it is, I think, not disputed by the plaintiffs, that when Radhanath first put forward this will and claimed exclusive rights under it, there was instantaneous opposition raised by Bonomally, and I believe also by Troyluckonath. When he applied for probate, *caveats* were entered, and in the end probate was consented to by Bonomally and Troyluckonath upon certain terms of agreement. Either Mr. Kennedy or Mr. Piffard, on behalf of the Plaintiff—I forget which—expressed much anxiety that I should not take this agreement between the members of the family as in any way modifying the disposition made by will. I do not think that that agreement can in law have any effect in modification of the will itself, but it may have very considerable effect as a contract obliging Radhanath to exercise such powers as he got under the will in favor of a mem-

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churn, through whom the plaintiff claims, having lived up to 1854, which was many years after he became of full age, it can be said that he, by not contesting the matter with his mother was at the time of his death barred by limitation. For, of course, if Woomachurn was barred, the plaintiff would be

ber of the family. Several letters which passed between the attorneys of the disputing parties were admitted in evidence. From these it is very clear for what terms the parties were stipulating. These letters led up to a conveyance or release, engrossed but not executed, which, at the time when it was offered I thought inadmissible for want of registration. I now think I was wrong on that point; because it has been made to appear since that that document, although in form an absolute conveyance or release of property, was of design not executed by the parties, and did not in any way represent an actual instrument of title. Eventually, however, the *visd voce* evidence of Troyluckonath supplied the materials which the exclusion of this deed at first prevented from coming before the Court. And these materials are, I think, valuable for the right understanding of Radhanath's own will. It seems to me very certain, on the whole of the evidence, that whatever doubt there might be in the beginning among the children of Kisto Chunder with regard to the effect of their father's will, Radhanath agreed to hold the property for the benefit of himself and brothers jointly, and that the negotiation for the conveyance and release stood entirely on this footing; and not only that, but, as a conveyance or release was never executed, the brothers continued all along (certainly up to the date of the plaintiff's mortgage) in the joint enjoyment of this property. The evidence seems to me all one way on that point, and I myself don't doubt, even from Rooplool Khettry's own testimony, that he was entirely aware of that fact. He and his advisers disregarded it and relied solely upon the title which could be given by Radhanath's will because

they thought that that was sufficient in law to give a valid foundation for the plaintiff's mortgage. And when we look to the terms to Radhanath's will by the light of the facts which I have just mentioned, it is clear enough. I think that will was written in view of them, and on the footing of that which had taken place between the brothers. He, like his father, disposes of the property for the benefit of the family. He speaks of the family as "we" and "us;" and he mentions them all by name, excepting Bonomally, as members of the family. And Bonomally he treats as an outsider (*reads the 8th Clause.*) It is, I think, quite clear that he looked on Bonomally as having separated and agreed to give up his share of the property for the consideration there referred to; and on that footing he directed Troyluckonath as trustee and manager of the property to dispose of it for the benefit of the other members of the family, exclusive of Bonomally. But Bonomally had not in fact given up his share. He had abstained from executing the conveyance or release; and had remained in continuous joint enjoyment of the property with his brothers: and it appears to me that, from the time of Radhanath's death up to the date of the execution of the plaintiff's mortgage, Bonomally was entitled to his one-third share of the property. If this be right, the plaintiffs are clearly not entitled to have the defendant, who claims from Bonomally, restrained from dealing with the property in the way he proposes. I have said enough to show in strictness that this suit should be dismissed. I ought, however, to add that I think Radhanath's will is conclusively proved, and the other will is proved by consent of the parties.

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barred now. I think that, under the circumstances, Woomachurn was not barred. Luckymoney was in the position of a trustee, and although the property stood in her name, and was dealt with as belonging to her, her possession and enjoyment were not adverse to her sons ; for, it is admitted, that they lived with, and were supported by, her, and, in fact, that, after they attained their majority, they managed the property for her. It is noticeable that the gift from Luckymoney to Prosunno Coommar Ghose was not made until the death of both the sons and of Shamaichurn's widow. It may well be that Luckymoney, who up to that time dealt with the estate as manager for her children, might have thought that, her sons and the widow of Shamaichurn being dead, there was nothing unfair in her falling back on the terms of the old will and giving a six-anna share of the family dwelling-house to the defendant, who, so far as blood is concerned, was as nearly related to Hurroondo Sirkar and herself as was the plaintiff. I think there was no adverse possession between Luckymoney and her sons, and that she was a mere trustee and manager of the estate of Hurroondo Sirkar up to the time of her death, that is, up to the year 1858 ; and, therefore, the plaintiff, notwithstanding the long time that has elapsed, and notwithstanding the fact that his father during his lifetime did not contest the matter, is not barred.

Taking this view of the case, it is unnecessary to enter on the further question raised and argued, *viz.*, supposing this property went to Luckymoney as a gift to her by her husband after marriage, and became her *stridhan*, whether or not the plaintiff would succeed on her death as her heir ? I express no opinion whether or not the plaintiff has made out his title to this property, if it was *stridhan* of Luckymoney.

The plaintiff is entitled to recover the six-anna share of the dwelling-house ; and, as Mr. Kennedy, on behalf of the plaintiff, waives his right to an account, I shall give a decree for possession and costs on scale No. 2.

From this decision the defendant appealed.

Mr. Woodroffe and Mr. Branson for the appellant.

Mr. Kennedy and Mr. Ghose for the respondent.

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Mr. Woodroffe.—The current of authorities shows that Hurro-
nundo's will gave Luckymoney an absolute estate. The lan-
guage of the will must be considered, and the expressed
intention must prevail in the absence of extrinsic circumstances
showing a different intention—*Sreemutty Soorjeemoney Dossee v.*
Denobundoo Mullick (1). The will was explained to the testa-
tor, as appears from an affidavit which, according to the practice
of the Court, was filed in support of the application for probate.
A testator using English legal phraseology must be taken to
have understood its technical force—*Ganendra Mohan Tagore v.*
Upendra Mohan Tagore (2). The cases of *Rooploll Khettry v.*
Mohima Churn Roy (3) and *Raj Lukhee Dabee v. Gokool*
Chunder Chowdhry (4) scarcely support the conclusion drawn
by Macpherson, J., that a Hindu, wishing to leave his property
away from his sons, must express that intention clearly: in the
former of these cases there can hardly be said to have been a
final judgment. Then, looking at the extrinsic circumstances,
we find the widow dealing with the property as if it were abso-
lutely hers. [COUCH, C.J.—The extrinsic circumstances which,
it is said, may affect the meaning to be attached to the testator's
words, must be circumstances existing at the time of making
the will, not subsequent thereto.] No doubt the extrinsic cir-
cumstances must, as it were, form part of the *res gestæ*, but the
widow's dealings with the property cannot be disregarded. In
Dialchundro Addie v. Kissorey Dossee (5), one of the earliest
cases on Hindu wills, the Supreme Court held that a widow
taking under the will of her husband was entitled to only a life-
estate, but the property of that decision has been questioned
by Sir F. Macnaghten in his *Considerations on Hindu Law*,
p. 35. The testator must be taken to have known the law—
certainly the Hindu law—and by his will he clearly gave his
widow an unrestricted, unfettered estate of the highest kind,
and then, by a separate clause, made her his sole executrix.
Then, as to whether this property came to Luckymoney as

(1) 6 Moo. I. A., 526.

(4) 13 Moo. I. A., 209; S. C., 3 B. L.

(2) 4 B. L. R., O. C., 103. at p. 140.

R. P. C., 57.

(3) *Ante*, p. 271.(5) *Montr. H. Wills*, 66.

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stridhan. The Dayabhaga, Ch. iv, s. 1, vv. 1 and 4, enumerates the six kinds of *stridhan*, and vv. 7, 8, and 9 explain what is meant by the "husband's donation." The words there used show that it is something given by the husband in his lifetime different from his entire estate, and this is borne out by v. 10, which limits the husband's gift by way of *stridhan*, and before the power of testamentary disposition was established, to 2,000 *panas*. By the Bengal law, where a widow takes property on her husband's death, it comes to her by way of inheritance, and not as *stridhan*. [COUCH, C.J.—If this were *stridhan*, the plaintiff would not take as heir. Mr. Kennedy.—The daughter Raymoney is dead. COUCH, C.J.—The right to inherit depends on whether or not she was alive at the time of her mother's death.] We state that Raymoney was then alive, and she as daughter, and not the plaintiff who was a son's son, would inherit—1 Macnaghten's Principles of Hindu Law, p. 40. The Dayabhaga, Ch. iv, s. 2, treats of the descent of *stridhan*, and v. 9 says that, on failure of both son and maiden daughter, the succession devolves with equal rights on the married daughter who has a son, and on her who may have male issue: here the daughter was married and had a son; see also the Dayakrama Sangraha, Ch. ii, s. 4, vv. 2 and 5; and Shamachurn Sircar's Vyavastha Darpana, 2nd ed., p. 733. The property having once come to Raymoney lost its character of *stridhan*, and she became a new *proposita* from whom the descent must be traced. The plaintiff's cause of action arose in the lifetime of his father who lived some years after the plaintiff came of age, the suit therefore is barred by the law of limitation—s. 2 of Act XIV of 1859 not applying to cases of implied trust; see Thomson on Limitation, p. 233, citing the definition of "trustee" from the report of the Indian Law Commissioners. [Mr. Kennedy.—The Act cannot be interpreted by that report; see *Donegall v. Layard* (1).] The question has never been actually decided; but in *Uma Sundari Dasi v. Dwarkanath Roy* (2), a *benamidar* was held not to be a trustee for the real owner within the meaning of s. 2 of Act XIV of 1859. So it has been held that a

(1) 8 H. L. Cr., 460, at p. 455.

(2) 2 B. L. R., A. C., 284.

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mortgagee who continues to hold mortgaged property after the mortgage-debt has been satisfied is not a trustee for the mortgagor within the meaning of that section—*Baboo Lall Das v. Jamal Ally* (1). The case of *Shahazada Mahomed Faaz v. Shahazadee Oomdah Begum* (2) is apparently opposed to the view contended for, but see the remarks on that case in Thomson on Limitation, p. 234, and the cases there cited. In England a distinction has been taken between express and implied trusts, see *Olegg v. Edmondson* (3); but it must be admitted that the words "express trust" are used in 3 & 4 Will. IV, c. 27, s. 25. Most of the cases on the point are summed up in *Petre v. Petre* (4). Finally, it is submitted that even though all points of law were decided against the defendant, he ought not to have been directed to pay the plaintiff's costs. He was sued as executor; the charges brought against him were abandoned; and the case at last turned on a point of law which was not raised on the pleadings.

Mr. Kennedy for the respondent.—In *Kumara Asima Krishna Deb v. Kumara Kumara Krishna Deb* (5), Markby, J., indicates an opinion that the testamentary power among Hindus is not a mere extension of the power of gift *inter vivos*, nor analogous to it. Gifts by will were altogether unknown in ancient times, consequently the mere absence of texts as to *stridhan* given by will does not justify the conclusion that *stridhan* could only be given during lifetime. *Rumdulol Sircar v. Sreemutty Joy-money Dabey* (6) shows that a legacy given to a woman by her husband's or her own relations is *stridhan*. Immoveable property given by a husband to his wife is not strictly *stridhan*, and will go to his heirs—Colebrooke's Dig., Bk v, Ch. 9, s. 2, § 515.

It was not shown that Hurronundo understood English, and the will is signed in Bengali. A Hindu will must be construed in accordance with Hindu law and Hindu thought; see *Gopeekrist Gosain v. Gungapersaud Gosain* (7). It is highly impro-

(1) 9 W. R., 187.

(2) 6 W. R., 111.

(3) 8 De G. M. & G., 787.

(4) 1 Drew, 371.

(5) 2 B. L. R., O. C., 11.

(6) 2 Morl. Dig., 65, Case No. 45.

(7) 6 Moo. I. A., 53.

bable that a man would give his property so as to leave his son without means of performing his *shrāddh*. There must be express words to disinherit the son—*Rooplohl Kettry v. Mohima Churn Ray* (1). In the *Tagore* case (2), the testator expressly assigned his reason for not giving his son Ganendra Mohan any interest. The case of *Diulchundro Addie v. Kisoorey Dossee* (3) was decided after due consideration. A Hindu woman cannot alienate immoveable property given to her by her husband in his lifetime; *Dayabhaga*, Ch. iv, s. 1, v. 23; *Colebrooke's Dig.*, Bk. v, Ch. ix, s. 1, § 477; *Dayakramā Sangraha*, Ch. ii, s. 2, v. 81; *Tenacorees Chatterjee v. Dinomath Banerjee* (4); and the same law must be taken to apply to gifts by will—*Gopekrist Gossain v. Gungapersaud Gossain* (5). [Couch, C.J.—Do you contend that, because a woman cannot alienate immoveable property given to her by her husband, therefore, it must go to his heirs?] Yes; or rather that the reason why she cannot alienate it is that it must go to his heirs. Admitting that *stridhan* would devolve in the manner stated on behalf of the defendant, yet the daughter would not be the *proposita*; she is not the full heir. *Stridhan* does not lose its character after the first descent, but if it did, the son's son, and not the daughter's son, would inherit, and the mother, and not the daughter, would be the *proposita*—*Pran-kishen Singh v. Mussumaut Bhagwatee* (6). As to the effect of Act XIV of 1859 on the plaintiff's right, it is submitted that s. 2 does apply to cases of implied trust; see the notes on that section in *Thomson on Limitation*. The learned Counsel also referred to *Norris v. Wright* (7) and *Knight v. Bowyer* (8).

Mr. Ghose on the same side.—There are two kinds of *stridhan*, that which is absolute, and that which is not. The former alone is alienable: and immoveable property given by a husband to his wife never becomes absolute *stridhan*, *Dayabhaga*, Ch. iv, s. 1, v. 18; *Shamachurn Sircar's Vyavastha Darpana*, §§ 428 and 429 (pp. 685 and 686); 2 *Macnaghten's Principles*, p. 215.

(1) *Ante* p. 271.

(2) 4 B. L. R., O. C., 103.

(3) *Mont. H. Wills*, 66.

(4) 3 W. R., 49.

(5) 6 Moo. I. A., 53.

(6) 1 Sel. Rep., 3.

(7) 14 Beav., 391.

(8) 23 Id., 609.

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The same distinction is taken by all the Hindu schools. Immoveable property given to a woman by her husband descends upon her death to his heirs—*Cossinaut Bysack v. Hurroosondry Dossee* (1). At the time of making his will, Hurronundo had two infant sons against whom he had no cause of complaint, and his daughter's son was not then born; under these circumstances it is impossible from a Hindu point of view to conceive that he intended to disinherit his sons.

Mr. Branson in reply.—The case of *G. v. K.* (2) contradicts that of *Cossinaut Bysack v. Hurroosondry Dossee* (1). If the property in dispute was not *stridhan*, Luckymoney had power to alienate it; if it was, it devolved on the plaintiff's mother as heir. As to *stridhan* losing its character after devolution, see *Srinath Gangopadhyaya v. Sarbamangala Debi* (3). The case of *Frankishen Singh v. Mussumaut Bhagwantee* (4) is explained in 2 Cowell's Hindu Law. pp. 219, 220.

The judgment of the Court was delivered by

COUCH, C.J. (after stating the facts, and observing with regard to the conveyance of 8rd February 1849 executed by Luckymoney, and signed by Shamachurn and Woomachurn as witnesses:—"This, Macpherson, J., says, is a proceeding well understood among natives as indicating that the sons, being parties, having an interest, gave their consent to the sale being made; but in the case to which he refers to in another part of his judgment—*Lukhee Dabea v. Gokool Chunder Chowdhry* (5)—the Judicial Committee say they cannot affirm the proposition that the mere attestation of such an instrument by a relative necessarily imports concurrence," continued)—The suit is brought by Tarrucknath Sirkar who claims the whole of the property, and he asked that it might be declared that, under and by virtue of the will of Hurronundo Sirkar, Luckymoney Dossee had no power to devise the property included therein. Mac-

(1) 2 Morl. Dig., 198, Case No. 124

(2) *Id.*, 284, Case No. 192.

(3) 2 B. L. R., A. C. 144.

(4) 1 Sel. Rep., 3.

(5) 13 Moo. I. A., 209; S. C., 3 B. L. R., P. C., 57.

pherson, J., made a decree in the plaintiff's favor, holding that the will of Hurmonundo Sircar must be read as merely making over the property to the wife to be held by her in trust for the infant heirs. He says in his judgment "there is no doubt that the question which has been raised is one of great importance to Hindus, as bearing upon the question of the principles upon which the Courts ought to act in construing wills made by Hindus." I quite agree to this; but it appears to me that the principles upon which the Courts ought to act have been authoritatively determined, and in the present case we have only to apply them. In *Sreemutty Soorjeemoney Doss v. Denobundoo Mullick*(1), the Judicial Committee say:—"The Hindu law, no less than the English law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition; nor, so far as we are aware, is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily the words of the will are to be considered. They convey the expression of the testator's wishes; but the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case, those circumstances no doubt must be regarded. Amongst the circumstances thus to be regarded, is the law of the country under which the will is made, and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the dispositions which he has made, had regard to that meaning or to that effect, unless the language of the will or the surrounding circumstances displace that assumption. These are, as we think, the principles by which we ought to be guided in determining the case before us; and we must first, therefore, consider what was the intention of the testator to be collected from the words of his will."

Although the will was signed by the testator in Bengali, I think it must now be assumed that it was explained to him, and that he understood its meaning. If it was not, and he did not

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(1) 6 Moo. I. A., 526, at p. 550.

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understand what he was signing, there would be no question of construction, for it would not be his will. Probate of it was granted by the Supreme Court, and its validity has never been questioned. Macpherson, J., says he has no doubt the whole family thought that Luckymoney was absolute owner of the property, and had the right to dispose of it at pleasure. It appears to me that the words of this will unequivocally show that it was the testator's intention that his wife should become the absolute owner of all his property. That is the meaning which the law has attached to the words he has used, and there is nothing in the language of the will to displace the assumption that he had regard to it; for the appointment of his wife as sole executrix is made with the view to complete the gift and enable her to obtain probate.

The surrounding circumstances are, as Macpherson, J., says, that the testator was a Hindu, and that he had at the time two infant sons, and there was no reason why he should desire to disinherit them. We cannot tell what reason he had for making a will, but the fact of his doing so shows, in my opinion, that he intended his wife to be something more than a trustee and manager for the infant heirs, as she would have been such if he had not made a will. It is not to be assumed that he made this will without reason: and if he, a Hindu, thought it right to make a will, it may well be that he thought he might leave to his wife to make a proper disposition of his property amongst his family. The learned Judge has declared her to be a trustee when the will contains no words whatever to create a trust. It is not, in my opinion, necessary that there should be an express declaration of his desire or intention to disinherit his sons, if there is an actual gift to some other person expressed in clear and unequivocal words, and I must respectfully dissent from the *dictum* of Phear, J., in the case (1) referred to by Macpherson, J. Nor can I agree with him in thinking that there is no indication of a desire to disinherit his sons. Allowing that a Hindu is less likely than any other person to disinherit his sons, it still appears to me that his desire and intention to do so may

(1) *Rooploll Khettry v. Mohima Dhurn Roy*, ante, p. 271.

be shown as in the case of another person by the disposition he makes of his property.

Upon the construction which I think I must put upon this will, the point taken by the Counsel for the respondent, the plaintiff, that the property being the gift of a husband to his wife was inalienable, and on her death would descend to the heirs of the husband, does not arise. The husband has given to his wife an absolute power of disposing of the property which she has exercised. This was not an ordinary gift by the husband to his wife to which the authorities cited might apply.

I think, therefore, that the decree should be reversed, and the suit must be dismissed with costs on scale No. 2, including the costs of the appeal.

Appeal allowed.

Attorneys for the appellant : Messrs. Swinhee, Law and Co.

Attorney for the respondent : Baboo Bhoobun Mohun Doss,

APPELLATE CRIMINAL.

Before Mr. Justice Phear and Mr. Justice Ainslie.

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Criminal Procedure Code (Act X of 1872), s. 296—Powers of a Sessions Court to order Committal of Accused discharged by a Magistrate.

An order by a Judge, under s. 296 of Act X of 1872, directing a Magistrate to commit an accused person, who has been discharged at a preliminary enquiry, to take his trial in a Court of Session, must specify the particular act constituting the offence charged. The Judge cannot direct a committal for offences with which the accused was in no way charged before the Magistrate.

ONE Tarucknath Mookerjee was charged before the Magistrate of Howrah with having committed an offence punishable under s. 200 of the Indian Penal Code. The warrant of arrest only specified this offence. One Allabux, in a suit under Act X of 1859 before the Deputy Collector of Howrah, execut-

* Miscellaneous Criminal Case, No. 17 of 1873.

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ed an instrument called an agentnamah, which was filed in that case. In this document the accused was described as "a mookhtear and attorney of the High Court," and on the reverse side were the initials of the accused. There was another document likewise called an agentnamah filed by the said Allabux in the appeal before the Collector. In this second document, the accused was described simply as "vakeel," and on the reverse side was the accused's signature in full below the words "we acknowledge and accept the power conveyed by this agentnamah." Both these documents were tendered in evidence for the prosecution at the preliminary enquiry. Evidence was given to show that the accused employed Counsel to conduct the Act X case for Allabux. The evidence also showed that neither the plaintiff Allabux, in the Act X case, who had instituted his suit as *paik* (1) of his master Issurchunder Ghose, zemindar, nor his master, were ever induced by the accused to consider him (accused) to be an attorney of the High Court or a vakeel, or to pay the accused any sum of money for his services as an attorney of the High Court or a vakeel. The Magistrate, on the 17th December 1872, discharged the accused, holding that the evidence was not sufficient *prima facie* to establish an offence either under s. 200 or any other section of the Penal Code. In the same month a person, whom the Sessions Judge described as one "who had no apparent interest in the matter, but was evidently actuated by some private ill-will" through a vakeel moved the Court of Session in December 1872, under s. 485 of Act XXV of 1861, to consider the case which had been dismissed, and order a committal of the accused. The case came on for hearing before the Judge in January 1873 after Act X of 1872 came into operation. The Judge, acting under s. 296, ordered the Magistrate to commit the accused to the Court of Session, to take his trial for having committed offences punishable under ss. 465, 468, and 471 of the Penal Code, without specifying wherein the forgery lay.

He agreed with the Magistrate that there was no offence made out upon the evidence already on the record punishable under s. 200, but he thought "that the evidence on the record,

(1) Subordinate collector of rents or Shanbogue.

together with other facts not disputed, but which are not but should be made legal evidence, raise a strong *prima facie* case, such as would justify any Magistrate in committing a case for trial at the Court of Sessions."

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Mr. *Sandel* for the accused applied to the High Court (Phear and Ainslie, JJ.) for, and obtained, a rule calling on the Government Prosecutor to show cause why the order of the Sessions Judge should not be set aside.

Mr. *Sandel* contended that the High Court, under s. 297 of Act X of 1872, had power to revise orders passed by any Subordinate Criminal Court in any judicial proceeding for any "material errors" whether of law or fact. Section 294 did not apply to the present matter, as it referred to "any case tried." "Trial" is defined in s. 3. The Judge could not pass such an order under s. 296, because, first, the charge on which he committed the accused for trial was different from that in respect of which the preliminary enquiry had been held; secondly, there was no evidence on the record of the offences described by the Judge; and, thirdly, because the Judge must act upon the evidence received by the Magistrate at the preliminary enquiry, and not be influenced by facts not upon record, and therefore not evidence in the cause.

The *Junior Government Pleader* (Baboo *Juggudanund Mookerjee*) showed cause. He contended that the High Court had no jurisdiction under Act X of 1872 to entertain the present application: s. 294 did not apply to the present case as the order of the Judge was not passed in a case "tried." The words, "material error in any judicial proceeding," in s. 297, were not used in a general way, but were limited to particular proceedings enumerated in the latter part of the same section. The order of the Judge in the present case did not come within any of the proceedings mentioned in that section.

He further contended that the two documents described as *agentnamahs* and filed in the Act X case were forgeries, for the accused by endorsing his name on the back of the documents had adopted the description of himself in the body of the docu-

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ments, which was false, and had thereby committed a fraud on the public generally and on the Court.

Mr. Sandel was not called upon to reply.

The judgment of the Court was delivered by

PHEAR, J.—It appears that in this case, Tarucknath Mookerjee was, in consequence of some knowledge or information obtained by the Magistrate, brought before the Magistrate under a warrant to answer a charge therein specified as a charge made under s. 200 of the Indian Penal Code. After taking evidence, the Magistrate was of opinion that that charge was not made out, and that the evidence did not justify his framing any other charge against the accused. Accordingly he discharged him from custody.

The Judge, exercising the powers given to him by s. 296 of the new Criminal Procedure Code, has directed the Magistrate to commit Tarucknath Mookerjee for trial for forgery. I think that this order of the Judge is bad for two reasons.

In the first place, it is too vague and indefinite for the Magistrate to act upon. It should have specified the document which the Judge considered to have been forged, and also the particular in regard to which it was forged; otherwise I do not understand how the Magistrate, who in this matter will have to act in a ministerial capacity only, can properly frame his commitment upon any specific charge at all; and I must further say that having regard to the evidence which was before the Magistrate, and which has come up to us on this occasion, I cannot perceive in what way any charge of forgery of a document can be made out at all.

And, secondly, I think the order is bad, because it directs that Tarucknath Mookerjee be committed for trial for having committed the offence of forgery, that being an offence of which he had not been in any form accused before the Magistrate. The section, or that portion of the section (296) which is applicable to the present matter, runs thus:—"Provided that, in Session cases, if a Court of Session or Magistrate of the dis-

trict considers that a complaint has been improperly dismissed, or that an accused person has been improperly discharged, by a Subordinate Court, such Court or Magistrate may direct the accused person to be committed for trial." I read this to mean, may be committed for trial upon that matter of which he has been, in the opinion of the Judge, wrongfully discharged by the Magistrate; in other words, committed for trial for some offence with which he was substantially charged in the complaint, or which was specified in the warrant, or which was framed as a formal charge by the Magistrate at the preliminary hearing. Unless the powers of the Judge under this section to commit for trial be thus limited, it seems to me that a very strange result would follow namely, that a man might be committed by the Judge for trial of an offence of which he had never been accused, or never even heard a word, as indeed would have happened here, until he was apprehended under the Judge's commitment. And as the Criminal Procedure Code seems to have been carefully framed with a view to provide that no one shall be committed for trial without having previously had a fair opportunity of meeting the charge upon which he is to be committed, I think this result I have mentioned can hardly have been contemplated by the Legislature; and I do not think the words when reasonably read with the context do give the Judge so extensive a power as that which is now sought for him.

For these two reasons I think the order of the Judge should be set aside.

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Rule absolute.

APPELLATE CIVIL.

Before Mr. Justice Phear and Mr. Justice Ainslie.

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MUSSAMUT RUTTANJOTE KOOER (JUDGMENT-DEBTOR) v. RAM
DASS (DECREE-HOLDER).*

Bengal Civil Courts' Act (VI of 1871), s. 22—Jurisdiction—Appeal—Execution—Act XXIII of 1861, s. 11.

The appeal from an order of a Subordinate Judge directing execution to issue lies to the District Judge, and not to the High Court, where the amount claimed in a suit is under Rs. 5,000, although the amount sought to be recovered in execution has, by the addition of interest since decree, grown to a sum exceeding Rs. 5,000.

A DECREE was passed in this case on the 22nd September 1862 for the amount claimed with interest. The amount or value of the subject-matter in dispute in the suit was admitted by both parties to be less than Rs. 5,000. In April 1872, the respondent, who had purchased the decree, applied for execution thereof, but by that time the amount decreed had grown by the addition of interest to a sum exceeding Rs. 5,000. Upon the hearing of the application for execution, the judgment-debtor raised certain objections, which were, however, overruled by the Subordinate Judge, who ordered execution to issue. The judgment-debtor appealed against this order to the High Court.

Baboo *Romesh Chunder Mitter* and *Rughoo Buns Sahoy* for the appellant.

Baboo *Annodapersaud Banerjee* and *Abinash Chunder Banerjee* for the respondent.

Baboo *Abinash Chunder Banerjee* for the respondent objected to the hearing of the appeal on the ground that, under Act VI of 1871, s. 22 (1), the appeal lay to the District Judge, and not

* Miscellaneous Regular Appeal, No. 211 of 1872, from an order of the Subordinate Judge of Shahabad, dated the 23rd April 1872.

(1) *Act VI of 1871, s. 22.*—"Appeals the District Judge, except where the from the decrees and orders of Subordinate Judges and Munsifs shall, when dispute exceeds Rs. 5,000, in which case such appeals are allowed by law, lie to the appeal shall lie to the High Court."

to the High Court. A law which takes away the right of appeal in regard to a suit, for the same reasons takes away the right of appeal in execution proceedings—*Anund Chunder Roy v. Sidhy Gopaul Misser* (1) and *Mobarukoonissa Begum v. Ozeer Jemadar* (2). Execution proceedings, being merely in furtherance of the original suit, are regulated by the provisions which govern the suit itself—*Ramanoogra Sahoy v. Byjnath Lall* (3). The subject-matter in dispute means the amount claimed, and not the amount which may ultimately be decreed—*In the matter of Duli Chand* (4). Under the old law the appeal in the present case would have lain to the District Judge; see Act XVI of 1868, s. 18. If the jurisdiction depends on the amount sought to be recovered in execution, s. 20 of Act VI of 1871, which limits the Munsif's jurisdiction to suits "in which the amount or value of the subject-matter in dispute does not exceed Rs. 1,000," would render inoperative s. 362 of Act VIII of 1859, which provides that the Court which passed the first decree in the suit is the Court which shall execute the decree passed on appeal.

Baboo Romesh Chunder Mitter for the appellant.—The subject-matter now in dispute is the amount claimed in execution. These execution proceedings are proceedings to enforce a demand; and according to Peacock, C.J., in *Golam Ally Chowdhry v. Gopaul Lall Tagore* (5), "any proceeding in a Court of

(1) 8 W. R., 112.

(2) *Ibid*, 107.

(3) *Before Mr. Justice L. S. Jackson and Mr. Justice Ainslie.*

RAMANOOGRA SAHOY AND ANOTHER
(DEFENDANTS) v. BYJNATH LALL
(DECREE-HOLDER).*

The 15th February 1871.

Appeal—Execution—Jurisdiction.

Baboo Mohesh Chandra Chowdhry for the respondents.

Baboo Khetter Nath Boss for the appellant.

The judgment of the Court was delivered by

JACKSON, J.—The appeal in this case

lay properly to the Zillah Judge, The circumstance of this Court having for special reasons thought proper to call up the appeal in the original case from the Court below, and to try it here as a regular appeal will not entitle the parties to prefer an appeal, directly to this Court in the proceedings in execution of the decree passed in that case. The proceeding will be remitted to the Zillah Judge, who will admit the appeal, and proceed to dispose of it in the same manner as if it had been originally presented in his Court.

(4) 9 B. L. R., 190.

(5) Case No. 1348 of 1867, dated 30th March 1868.

* Miscellaneous Regular Appeals, Nos. 380 and 430 of 1870, from the orders of the Subordinate Judge of Tirhoot, dated the 22nd August 1870.

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Justice to enforce a demand is a suit." [PHEAR, J.—Do you contend that a proceeding in execution is a suit distinct from the original suit?] Yes; the decree gives a new cause of action. [PHEAR, J.—What the Full Bench decided was that a proceeding in execution of a decree was prosecuting a suit on the same cause of action against the same defendant within the meaning of s. 14, Act XIV of 1859, which saved the decree from being barred in another suit.] All that was decided in *In the matter of Duli Chand* (1) was that the subject-matter in dispute was the subject-matter before the Court of first instance. [PHEAR, J.—The effect of your argument would be that whereas in one month the appeal would lie to one Court, by a short delay the appeal in the next month would be to another Court.] Under s. 18, Act XVI of 1863, the appeal would have been to the High Court. Act VI of 1871, s. 20, only defines the jurisdiction of the Munsif in regard to original suits, and not to execution proceedings. *Mabarukoonissa Begum v. Ozeer Jemadar* (2) and *Anund Chunder Roy v. Sidhy Gopal Misser* (3) turned on the construction of Act XXIII of 1861, s. 27, the language of which is very different from s. 22, Act VI of 1871. *Ramanoogra Sahoy v. Byjnath Lall* (4) was decided before Act VI of 1871 came into operation.

The Judgment of the Court was delivered by

PHEAR, J.—We think that the preliminary objection is a good objection and must prevail.

It is admitted by both parties that the subject in dispute in the suit wherein the decree was made was in amount or value less than Rs. 5,000. A decree for the amount claimed with interest was, I understand, given on the 22nd September 1862; and the application for execution which is now brought before us was made some time in April 1872; but by that time the amount decreed had grown by the addition of interest to a sum exceeding Rs. 5,000. Upon the hearing of that application for

(1) 9 B. L. R., 190.

(2) 8 W. R., 107.

(3) 8 W. R., 112.

(4) *Ante*, p. 291.

execution, objections were raised by the judgment-debtor, who seems to have been present. The Subordinate Judge overruled those objections and directed the execution to issue. It is this order of the Subordinate Judge against which the present appeal is preferred.

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Now by s. 11, Act XXIII of 1861, "all questions regarding the amount of any mesne profits which by the terms of the decree may have been reserved for adjustment in the execution of the decree, &c., * * * and any other questions arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree, shall be determined by order of the Court executing the decree, and not by separate suit." Evidently it is just such a question as this in the section mentioned, which was determined by the order of the Subordinate Judge engaged in executing the decree, namely, by the order appealed against. The section goes on to say : — "And the order passed by the Court shall be open to appeal." This then is an order made, as it seems to me clearly, in the suit in which the decree was made, and not in a separate suit, and is an order which by the terms of this section is open to appeal.

S. 22, Act VI of 1871, is the enactment which now provides for the course of appeal (*reads*). Now the present appeal is an appeal from the Subordinate Judge, and it will therefore lie to the District Judge, unless within the meaning of this section the subject-matter in dispute exceeds Rs. 5,000.

Baboo Romesh Chunder Mitter has urged upon us with much force that the subject-matter in dispute between the parties to this appeal is the amount which is at this time due under the decree, and which will be levied against one of them if the order of the Subordinate Judge now appealed against is allowed to have force. It appears to me however that, when the decree or order which is the subject of appeal is a decree or order made in a suit, whether during the execution proceedings or previously thereto, the subject-matter in dispute within the meaning of this section is the subject-matter in dispute in that suit, and not the mere amount of money which the order itself may directly affect. This view has already been taken by Judges of this

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Court, for it has been lately determined by a decision *In the matter of Duli Chund* (1) that the subject-matter in dispute in a suit is the subject-matter for which the plaint is brought, and is not limited in the case of an appeal to the amount which the decree may have awarded as between the parties to the appeal. It appears to me that, if we put any other construction than that which I have mentioned upon the words, we should make the section have an operation which could not have been contemplated by the Legislature, for it would cause the appeal to shift from one Court to the other, merely by such lapse of time as would suffice to make an amount which when decreed fell below Rs. 5,000 grow by the increment of the interest to a sum above Rs. 5,000. It appears to me very clear that the order which is now appealed against is an order made in the course of a suit, the original subject-matter of dispute in which was by the admission of the parties an amount less than Rs. 5,000, and I think for that reason, under s. 22, Act VI of 1871, the appeal lies to the District Court, and not to this Court.

The application must be rejected with costs.

Appeal dismissed (2).

PRIVY COUNCIL.

P. C.*

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March 21.

THE GENERAL MANAGER OF THE RAJ DURBUNGAH UNDER THE COURT
OF WARDS (DEFENDANT) v MAHARAJAH COOMAR RAMAPUT
SING (PLAINTIFF).

{On appeal from the High Court of Judicature at Fort William in Bengal,

Acts X and XI of 1859—Sale in Execution of Estate of Deceased—Decree Inter Partes.

A sued, under Act X of 1859, the widow of Z, as widow of Z and guardian of Z's son, for arrears of rent due by Z. He obtained a decree in 1862 against the widow as Z's representative, but it was declared that Z's son was not liable, on the ground that he had been adopted into another family. In a regular suit, A obtain-

See also

15 B.L.R. 147
12 B.L.R. 103

* *Present* :—THE RIGHT HON'BLE SIR JAMES COLVILLE, LORD JUSTICE JAMES,
SIR MONTAGUE SMITH, AND SIR ROBERT COLLIER.

(1) 9 B. L. R., 195.

(2) See *Rai Dhanpat Singh Bahadur v. Madhupati Debis*, 9 B. L. R., 197.

ed a decree declaring Z's son to be the heir of his natural father Z. Certain estates of the deceased were then, in 1867, put up for sale under Act XI of 1869, in execution of A's decree for rent, and A became the purchaser. The certificate stated that the sale was of the right and interest of the widow, and that it took place under the decree in the regular suit. B, the holder of a prior decree for rent against Z, having failed to obtain execution against the same property, then sued A and Z's son for a declaration that he was entitled to sell the property, on the ground that it had come to Z's son as Z's heir, and that only the interest of the widow (who had no interest) had been purchased by A. Held (reversing the decision of the High Court) A was entitled to the property.

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The case of *Issan Chunder Mitter v. Bukeh Ali Boudagur* (1) approved of

In November 1858, the respondent obtained a decree against Gourpershaud Mahata for Rs. 14,636 for arrears of rent, which was affirmed on appeal in 1861.

Gourpershaud having died, the appellant brought a suit under Act X of 1859 against "Musamut Choocharoo Koor, as mother and guardian of Hurpershaud, the minor son and heir of Gourpershaud" to recover Rs. 11,000 for rent due by Gourpershaud in his life. The lady answered that Hurpershaud was not liable, he having been adopted into another family, and that she was in possession of her husband's estate. The Collector on the 12th November 1862, holding that that was a good defence, gave judgment for the plaintiff, and ordered the widow to pay, but concluded, by declaring the property, which it should be ascertained Gourpershaud had left, liable.

The respondent having applied for execution of his decree against the widow and son, the same objection to the liability of the son was raised, and he was held not liable, but the decree was, on the 16th May 1863, ordered to be executed against the properties of the judgment-debtor.

For some time neither decree-holder succeeded in getting any satisfaction.

On the 13th April 1865, the appellant filed a suit against the widow and son, setting forth the following facts, viz., that Gourpershaud and Sheopershaud were joint; that Sheopershaud died first childless, leaving a widow Buchun, whereby, according to Mithila law, Gourpershaud, would take the whole property; that Buchun then, without authority from her husband,

(1) Marsh. Rep., 614.

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adopted Hurpershaud according to *kritima* form ; that that could give him no right as Sheopershaud's son, nor discharge him from liability as Gourpershaud's ; and the plaintiff sought to enforce the decree against the property which had been joint. A decree was given in favor of the plaintiff in that suit, which decree was affirmed on appeal on the 29th May 1867.

On the 27th November 1867, the Collector put up the properties mentioned in the decree for sale under the old execution under Act XI of 1859, and the appellant became the purchaser, and obtained certificates on 10th January 1868. These certificates stated the sale to be of the right and interest of Mussamut Choocharoo Kooer in satisfaction of the decree under Act X of 1859, but on the 13th May 1868, an addition was made, saying that the estate mentioned in the certificate had been sold by auction by virtue of the decree in the regular suit by the manager above-mentioned.

The respondent took no steps to enforce his decree for rent until after the decision in the appellant's suit, declaring the property subject to seizure ; but, on the 17th September 1867, he applied for execution against those estates. The appellant objected to this on the ground that he had bought the property, and nothing remained to sell in execution, and the objection was allowed to prevail.

On the 7th August 1868, the respondent brought the present suit against the appellant and Hurpershaud to have his right declared to sell the lands of Hurpershaud, to whom he contended they had come as heir, the appellant having purchased only the interest of the widow, who in fact had no interest. The Subordinate Judge of Tirhoot held that the appellant's execution was not against the widow personally, but against her husband's estate and that the sale was in fact of Gourpershaud's property, and dismissed the suit. The High Court (1) on the 28th May 1869 reversed that decision, and held that the appellant had purchased only the right and interest of the widow, and that the plaintiff was entitled to sell the lands of Gourpershaud as being the property of his son.

(1) Kemp and Glover, J.J.

Sir. R. Palmer, Q.C., and Mr. Doyme, for the appellant, contended, on the authority of *Issan Chunder Mitter v. Buksh Ali Soudagur* (1), that the decree obtained by the appellant was against the widow in her representative capacity only, and that the sale conveyed all interest which her husband had.

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Mr. Leith for the respondent contended that the purchase purporting only to be of the widow's interest, it must be looked at strictly; for if the advertisement of sale had shown that more than this was being sold, a much larger sum might have been obtained, probably sufficient to satisfy both claims. There was no reason why the wording should be such as apparently to include only that share. The appellant's title-deed did not show more than a purchase of the widow's interest; and, as the property was in the son, that son's interest could not pass.

Their LORDSHIPS delivered the following judgment:—

These proceedings certainly illustrate what was said by Mr. Doyme, and what has been often stated before, that the difficulties of a litigant in India begin when he has obtained a decree. When, however, the actual question which is at issue between the appellant and the respondent on their appeal is eliminated from the rest of the record, it does not appear to their Lordships to present any very great difficulty.

The appellant and the respondent had each, it must be assumed, a good claim against the estate of the deceased, Gourpershaud. The respondent had obtained a decree according to the practice then existing in the Civil Court in the lifetime of Gourpershaud. The appellant, pursuing his remedy for rent under Act X of 1859 in the Collector's Court, had obtained a decree for the arrears of rent in respect of which he sued the widow as the widow of the deceased and the guardian of her infant son. It was a suit brought against those who were supposed to be the representatives of the debtor, Gourpershaud. In that suit the case set up by the defendants was that the infant was not the heir of his father; that he had been adopted into another family, and that consequently the widow

(1) Marsh, Rep., 614

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was the sole heiress and representative. The decree was against the widow in that capacity. It declared that the son was not liable, and ended with a declaration which clearly pointed to the realization of the demand out of the estates of the deceased, Gourpershand, and showed that the decree was made against the person supposed to be the heir and representative of Gourpershand. Other difficulties being interposed in the way of executing that decree, the appellant thought it necessary to go to the Zillah Court in order to get rid of certain deeds, as well as of the alleged *heritima* a loption of Hurpershaud, the son, and he succeeded in obtaining a decree, which was afterwards affirmed by the High Court, the result of which may be taken to affirm that Hurpershaud was the heir of his natural father. The execution of the Collector's decree had in the meantime been suspended. When the decree of the Civil Court became final, an intimation was sent to the Collector that the stop order which had been put upon the execution should be removed, and that the execution might go on. Execution of that decree was accordingly had under the conjoint provisions of Act X and Act XI of 1859, and perhaps it is owing to the operation of those statutes, and in particular to the fact that the execution took place under Act XI of 1859 by putting up the property for sale in the same way that an estate would be sold for arrears of revenue, and did not proceed under the ordinary Civil Code Act VIII of 1859, that some of the confusion and difficulties which have taken place in this case have arisen. However that may be, the estates in question were sold under the Collector's order, and purchased by the judgment-creditor. That took place in November 1867. In the meantime certain proceedings had taken place in the suit of the respondent. The respondent had originally applied for execution of his decree obtained in the lifetime of Gourpershand against the widow and the infant son. He was met by the same allegation that had been made in the appellant's suit that Hurpershaud had no interest in his father's estate, and a miscellaneous order was made, which held that Hurpershaud was not liable for his father's debt, and treated the widow as the sole representative. Afterwards the respondent attempted to get the benefit of the decree which had been

obtained by the appellant, and to proceed against Hurlpershand, and on that occasion the appellant intervened as an objector. The Judge disallowed the objection, but, at the same time, held that the former execution proceedings were invalid, and directed them to be struck off the file. The respondent then commenced other proceedings against Hurlpershand, and although there was no formal discharge of the miscellaneous order, the Judge appears to have considered that as swept away with the former execution proceedings, and no longer operative, and directed a sale in execution, which, if there were nothing else in the way of it, would probably have been regular against Hurlpershand as the heir of his father. However, when the respondent was proceeding to carry out that order, the appellant came in and objected that the estates had already been sold under his decree, and had been purchased by him, and that in fact they could not be any longer sold as the estates of Hurlpershand. That objection prevailed, and the result was that the respondent's only remedy was to bring the regular suit out of which this appeal has arisen.

From the above statement it is clear that, unless there be some fatal irregularity in the mode in which the decree of the appellant was obtained or drawn, or some fatal irregularity in the mode in which that decree has been prosecuted, the estates have been regularly sold, and that the suit of the respondent, seeking to set aside the order for sale, and to get the benefit of his own execution as against Hurlpershand as the heir of his father, must fail.

Their Lordships are of opinion that no case has been made upon which they can say that there has been that irregularity in the proceedings before the Collector and the sale which took place, which would justify them in setting aside the sale, and upon that point they must differ from the Judges of the High Court. The proceedings took place under Act XI of 1859, and that Act appears to contemplate that the estate should be put up for sale, and that the person whose interest should be nominally sold should be the registered proprietor. In this case, so far as the proceedings show, it appears that the widow was the registered proprietor. But the case does not rest there,

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because in the certificate of sale there is a distinct reference to the decree obtained by the appellant from the Zilla Court and therefore the whole proceeding, if fairly looked at amounts to this,—that the estate of Gourpershaud was sold under that decree in execution for his debt, and that the interest of his widow, the registered proprietor and ostensible owner of the estate, and also the interest of his son, if he had any interest, was bound by that decree. If that be so, the question arises whether the respondent, the plaintiff in the suit below, has any ground upon which he can come in and impeach the sale? It appears to their Lordships that he can claim only what interest remained in Hurpershaud, and that substantially the proceedings would be a bar to any claim on the part of Hurpershaud. It is unnecessary to consider whether, in any question between the respondent and Hurpershaud, who in this suit came in and continued to dispute his heirship, the decree in this suit which had been obtained by the appellant would be any binding adjudication between the respondent and Hurpershaud. It appears to their Lordships clearly to be a mere decree *inter partes*, and that there is no ground for giving it the effect of a decree *in rem*, which is the effect which one passage in the judgment of the High Court appears to attribute to it. But without going into that, it seems sufficient to their Lordships for the determination of this appeal to say that there was in their judgment no substantial irregularity in the sale before the Collector, and that therefore, that, as between the appellant and respondent, the appellant is entitled to, and cannot be deprived of, the benefit which has resulted to him from his greater diligence in enforcing his demand.

Their Lordships also desire to add that they are unable to see any substantial distinction between this case and that of *Issan Ohunder Mitter v. Buksh Ali Soudagur* (1). They entirely agree in the principles expressed by Chief Justice Peacock in that case, and think that they govern the present case.

The result therefore must be that their Lordships will humbly recommend to Her Majesty that this appeal be allowed, the

(1) Marsh. Rep., 614.

judgment of the High Court reversed, and the judgment of the lower Court affirmed. The costs of the appeal will, of course, follow the result, and the appellant will be entitled to the costs of the appeal in the Court below.

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Appeal allowed.

Agents for appellant : Messrs. *Watkins and Lattey*.

Agents for respondent : Messrs. *J. H. and H. R. Henderson*.

WILLIAM HAY, COMMONLY CALLED LORD WILLIAM HAY
(CO-RESPONDENT) v. WILLIAM GORDON (PETITIONER).

P. C.
1872
July 30, 31,

[On appeal from the Chief Court of the Punjab.]

Act IV of 1869, s. 17 (1)—Act XIV of 1859, s. 1, cl. 16—Concurrent Judgments on Facts—Confirmation by High Court of Decree of District Judge.

Act IV of 1869, s. 1, cl. 16, does not apply to divorce suits.

A decree of a High Court confirming the decree by a District Judge for dissolution of marriage reversed, so far as it affected the co-respondent and condemned him in costs. The circumstances of the case took it out of the general rule not to reverse the concurrent findings of two Courts on a question of fact.

In this suit, which was brought under Act IV of 1869 in the Judge's Court at Umballah, on the 25th June 1869, the petitioner prayed for a dissolution of his marriage with his wife Louisa Elizabeth, and to condemn the appellant in costs.

The grounds stated in the plaint were adultery with a Mr. Watson (since deceased) in 1853, and adultery with the

(1) *Act XIV of 1859, s. 17.*—"Every decree for a dissolution of marriage made by a District Judge shall be subject to confirmation by the High Court. Cases for confirmation of a decree for dissolution of marriage shall be heard (when the number of the Judges of the High Court is three or upwards) by a Court composed of three such Judges, and in case of difference, the opinion of the majority shall prevail, or (where the number of the Judges of the High Court is two) by a Court composed of such two Judges, and in case of difference, the opinion of the senior Judge shall prevail. The High Court if it think further enquiry or additional evidence to be necessary, may direct such enquiry to be made, or such evidence to be taken."

* *Present* :—THE RIGHT HON'BLE SIR JAMES W. COLVILLE, SIR B. PEACOCK
SIR M. E. SMITH, SIR R. P. COLLIER, AND SIR L. PEARCE.

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appellant in 1859 and 1860, and adultery with other persons in 1860.

The petition was served on the appellant in England in August 1869.

On the 13th August he sent out instruction to India to retain Counsel for him to act upon the instructions, which were that he should apply for further particulars and obtain a commission to examine the appellant.

These instructions were not attended to; but on the 15th November 1869 the issues were settled; and on the 18th November the case was tried, witnesses being examined on both sides; and the Additional Commissioner of Umballah made a decree *nisi* for the dissolution of the marriage with costs against the appellant.

In January 1870, the appellant saw a report of the case in a newspaper, and immediately sent out to India an affidavit denying his guilt, and stating the circumstances under which he had sent out instructions for his defence. His Counsel accordingly presented a petition to the Chief Court of the Punjab (to which Court the decree had been sent for confirmation under Act IV of 1869), in which he submitted that the suit was barred by limitation; that the decree of the Judge was not justified by the evidence; that the appellant had been taken by surprise by the rapid way in which the case had been disposed of; and that he was willing to have been examined as a witness in the case, but he had not had an opportunity of being so examined. It also objected to the non-joinder of other persons as co-respondents. It prayed that, unless the Chief Court dismissed the petition on the other grounds that his evidence might still be received under a commission. The Chief Court (C. R. Lindsay, H. S. Cunningham, and J. S. Campbell) on the 23rd July rejected the application on the grounds hereinafter mentioned in their Lordships' judgment, and confirmed the decree, condemning the appellant to pay costs. The evidence taken in the case is also fully referred to in that judgment.

Lord William Hay appealed to Her Majesty in Council against the decision of the Chief Court.

Mrs. Gordon died pending the appeal.

Dr. Deane, Q. C., and Mr. Leith for the appellant.—Act XIV of 1859, s. 1, cl. 16, applies to all suits save those mentioned in the other clauses, and must be taken as applicable to divorce suits. But even if not barred by limitation, there has been such gross delay pressing hardly on the appellant that the petition ought to have been dismissed. The Court below had not issued rules of practice as proved by Act IV of 1869, s. 62, and the appellant ought to have been allowed to give his evidence. He has not had a fair trial. The learned Counsel then commented upon the evidence.

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Mr. C. Pollock, Q. C., and Mr. R. A. Pritchard for the respondent.—Act XIV of 1859 does not apply. S. 7 of the Indian Divorce Acts says that the principles under which the Divorce Court in England acts are to be applied, and limitation is no bar to a proceeding for a divorce in that Court. The delay is not of such a nature as to prevent the respondent obtaining relief, the co-respondent being in England. The appellant has only himself or his legal advisers to blame for not applying for a postponement, and taking the necessary steps to give his evidence on the hearing of the suit. The suit was fully contested, and it was in the discretion of the Chief Court to allow or to refuse to allow additional evidence. The two Courts have agreed on a question of fact, and this Board will not in such a case interfere.

Their LORDSHIPS delivered the following judgment :—

This is an appeal brought by Lord William Hay, the co-respondent, against a judgment of the Chief Court of the Punjab, confirming a judgment of the Additional Commissioner at Umballah, whereby Colonel Gordon obtained a dissolution of his marriage with his wife on the ground of her adultery with Lord William Hay, and Lord William Hay was ordered to pay the costs of the suit.

Before the year 1869, the Indian Courts had only power to decree divorces *a mensâ et thoro*. The power of the Court of divorce in this country of granting divorces *a vinculo* was first introduced into India by Act IV of 1869, which enacts that subject to its provisions "the High and District Courts shall,

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in all suits and proceedings hereunder, act and give relief on principles and rules which in the opinion of the said Courts are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief." There is a power to make rules and regulations not inconsistent with the Act and the Code of Civil Procedure in India. But it would appear that no rules have been made, and therefore the principles and rules which obtain in the Divorce Court in this country are as nearly as may be to be applied in India. Power is given to district Judges in the first instance to hear divorce causes, but their decrees are not final, or indeed operative at all, until confirmed by the decree of the High Court, which is empowered to direct further enquiry to be made or additional evidence to be taken. In this case the High Court was the Chief Court of the Punjab.

The first question which has been raised is whether or not the Statute of Limitation is a bar to this suit? It is argued that the cause of action arose in 1859 or 1860 when the acts of adultery are said to have been committed, or at all events in the year 1862, when Colonel Gordon says that the misconduct of his wife came to his knowledge. Act XIV of 1859, after prescribing particular terms of limitation for certain actions, enacts that with respect to all suits and actions not before specifically provided for the term of six years shall apply, that is six years from the time when the cause of action accrued. Their Lordships are of opinion that the provisions of that Act do not apply to suits for divorce *a vinculo*, which at the time when it passed were unknown in India. They are confirmed in the view which they have taken of the intention of the Legislature by the Limitation Act which was passed last year (Act IX of 1871), which expressly enacts that its provisions shall not apply to suits under the Indian Divorce Act.

The appellant further relied upon substantially two grounds; the first was that justice had not been done him in this suit, inasmuch as he ought to have had an opportunity of being examined in this country by a commission; and secondly, that upon the general merits of the case the decree was wrong.

With respect to the first question, the material facts appear to be these. The alleged adultery was in the years 1859 and 1860. The petitioner does not aver with any particularity at what time in those years the acts of adultery were committed. Lord William Hay left India in 1862, and has resided in England ever since. In 1862 Colonel Gordon says he became aware of his wife's adultery by what he regarded as a confession by her in a certain letter which will be subsequently referred to, and that at that time he endeavoured to establish a case by the examination of witnesses in India; but it would appear that those very witnesses, who have been now called for him, at that time either could not or would not give evidence sufficient to establish his case. This suit was instituted in June 1869. Lord William Hay for the first time heard of it on receiving the summons in the beginning of August in that year. Upon that he immediately took what undoubtedly was the proper proceeding of applying to an able Counsel for his opinion, and that Counsel advised in substance that application should be made to the Court in India for further particulars, and upon these particulars being obtained for a commission for the examination of Lord William Hay. Lord William Hay, upon the 13th of August, wrote to Mr. Chisholm at Simla, who held a power-of-attorney from him, enclosing a copy of his Counsel's opinion, and requesting that an advocate might be retained for him to act upon the instructions therein contained. It appears that Mr. Cunningham was so retained, but it does not appear that this gentleman acted in conformity with those instructions; the reasons for his not so acting do not appear.

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The cause was heard before the Commissioner of Umballah on the 19th and 13th November 1869. The Commissioner pronounced against Lord William Hay, decreeing a dissolution of the marriage on the ground of adultery with him and condemning him in costs. Lord William Hay states in his affidavit that he was not aware of this decision until January of the next year 1870, when he received a short report of the case in *The Mofussilite* newspaper; that he then sent out an affidavit (which appears in the record) denying his guilt, stating a variety of circumstances, and among other things setting out the

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opinion of Counsel above referred to. In pursuance of that affidavit, and a petition which he also sent to India, it appears that his Counsel before the Chief Court of the Punjab. Mr. Plowden, upon the 19th of May, presented a petition to that Court containing various grounds of defence, and stating this among other things:—"The co-respondent is and always has been willing to tender himself as a witness in the case, and prays that, if the petition be not otherwise dismissed as against him, his evidence may be taken by commission." Upon the hearing of the cause before the Chief Court of the Punjab in July 1870, the Court declined to comply with this request on these grounds; they say:—"We see no likelihood of any sort of advantageous result from the issue of a commission. We have Lord William Hay's positive denial on oath on the record, and though we should be anxious to offer a litigant so circumstanced every possible facility and indulgence in the hearing of the case, it is not, we think, necessary, and would not therefore be expedient now, at the last moment, to re-open the proceedings by the grant of a commission which could scarcely bring any new fact before us, would place Lord William Hay's disavowal in no stronger a light, and would postpone the relief prayed for," and the Court subsequently make this observation:—"With regard to the co-respondent, we have further to remark that his explanation of his proceedings is not, in our opinion, satisfactory, and that we cannot regard the course which he has pursued as in any degree adequate to the gravity of the occasion, or as indicating a serious intention to resist the present proceedings." Their Lordships are not able to agree with the Chief Court that Lord William Hay's general denial in the affidavit is at all equivalent to what would or might have been a circumstantial denial by him of the facts stated by the witnesses, or an explanation of these facts, upon an examination by a commission; and they are also unable to agree with the Chief Court in the remark that they cannot regard the course pursued by him as adequate to the gravity of the occasion, or as indicating a serious intention to resist the proceedings. Their Lordships see no reason to doubt that Lord William Hay has all along

seriously and earnestly desired to resist these proceedings to the best of his ability. Upon this part of the case their Lordships have come to the conclusion that it would have been desirable and proper, under all the circumstances, to accede to Lord William Hay's application for a commission to examine him.

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But their Lordships do not rest their decision upon this ground. After giving the whole case their best consideration, they have come to the conclusion that there is no sufficient evidence upon which this decree against Lord William Hay can be supported.

In their Lordships' opinion, the evidence against Lord William Hay is entirely that of the native witnesses. Before coming to this, however, it is well to make an observation upon other evidence which was admitted in the case, and which undoubtedly was admissible as against the respondent, Mrs. Gordon, *viz.*, her own confessions, or what are contended to have been her own confessions. As far as the correspondence is concerned, the only passage which in any way bears upon her relations with Lord William Hay, is the following, in letter H, which must have been written somewhere about April 1862 from England to her husband then in India:—"I have your letters as to what occurred at Simla. Herbert always told me that you knew of it, and did not care. Lord William Hay told me the same thing. Herbert always told me that Emily knew of it, and I firmly believe that both you and she did." What she is writing about here is clearly misconduct of her own, and it may be assumed to be adultery with a gentleman at Simla, referred to by the name of Herbert. It appears that the person here designated as "Herbert," told her that her husband knew of this adultery, and did not care. She also says "Lord William Hay told me the same thing." It appears to their Lordships that the view taken of this expression in her letter by the Court above is more correct than that taken by the Court below, *viz.*, that it does not amount to a confession on her part of any adulterous intercourse with Lord William Hay, but merely to a statement of a conversation with him on the subject of her misconduct with another person, and her husband's supposed sentiments regarding it.

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On this part of the case—the lady's confessions—a Mrs. Byrne is called, who lives at Simla, and whose house Mrs. Gordon rented. This lady is the grandmother of a Mr. Johnson who was retained in this case to get up the evidence on the part of Colonel Gordon, and she does speak to a communication from Mrs. Gordon which would undoubtedly lead to the inference that she had committed adultery with Lord William Hay. It is certainly somewhat remarkable, as has been forcibly remarked by Dr. Deane, that this lady should, if the statement be correct, not have communicated it in 1862 to Colonel Gordon, who was then attempting to procure sufficient evidence to obtain a divorce, as Mrs. Byrne must probably have well known.

Their Lordships have thought it necessary to say a word upon this part of the case, although no statements of Mrs. Gordon, written or verbal, are, according to well known principles of law, admissible against Lord William Hay; and they now refer to the only evidence against him, which is that of the native witnesses. Without going through that evidence in detail, it may be enough to say that part of it is simply hearsay, and of an extremely unsatisfactory and loose character, to say the least of it, such as that of "Boofah," who speaks of having seen a horse tied up near Mrs. Gordon's house at 12 o'clock at night, which she heard from some grooms was the horse of Lord William Hay, those grooms not being called. There is evidence of Lord William Hay coming to the house on a good many occasions and dining there very frequently, but that is not evidence which if taken alone, would at all lead to the inference of adultery. There is the evidence of a jampan bearer to the effect that on three occasions he, together with other bearers (it appears there would be four bearers of the jampan), took Mrs. Gordon to Lord William Hay's house about 8 or 9 o'clock at night, it does not appear at what time in the year. According to his account, the jampan bearers and the jampan remained outside, visible to all persons who might be passing, which would not point to the conclusion that the visits were of an adulterous or even of a clandestine character. Further, there is the evidence of a man of the name of Torab, who had been in the service of Colonel Gordon from the year 1856 down to the

present time, and this is the only witness who speaks of any familiarities between Lord William and Mrs. Gordon. His statement is to the effect that Lord William Hay frequently came to Mrs. Gordon's when her husband was absent (indeed her husband does not seem to have been much at Simla); that Lord William came to dinner two or three times a week, sometimes in company, sometimes alone, and the witness goes on to say that when he would take away the coffee, Mrs. Gordon and Lord William Hay would be sitting on a sofa together, he with his arm round her waist. This witness appeals in confirmation of his statements to the evidence of an ayah of the name of Peerun, who, if not supposed to have witnessed the same familiarity, still was constantly in the house, and would, of course perfectly well know whether Lord William Hay was there frequently or not. Torab says, that the ayah was aware of the frequency of Lord William Hay's visits, and of the familiarity between Lord William Hay and Mrs. Gordon, and that he and the ayah were in the habit of discussing it together, and both of them discussing it with Mrs. Byrne. He also states that in the year 1862, when he was in Colonel Gordon's service, upon Colonel Gordon questioning him concerning the facts to which he was then deposing, he denied all knowledge of them; he adds, "last year Colonel Gordon gave me great encouragement" (*dilasa* is the native word) "to speak the truth, and promised to forgive me every thing if I would; then I told the sahib."

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The ayah Peerun, upon being called, contradicts the evidence of Torab; and is, in fact, a witness in favor of Lord William Hay. She, instead of confirming the account which Torab had given as to Lord William Hay's frequent visits and his intimacy with Mrs. Gordon, says this:—"I was in Mrs. Gordon's service about nine years ago. Know of nothing between her and Lord William Hay. He only called on her twice to my knowledge;" this entirely agrees with Lord William Hay's own account in his affidavit, where he says that he only called twice upon Mrs. Gordon; one of his visits being to a certain extent on a matter of business, and that he dined once in the house of Colonel Gordon. She does speak, and so does

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one other witness, to an occurrence, certainly somewhat extraordinary, *viz.*, Mrs. Gordon going to Lord William Hay's house at night, or late in the evening, breaking some of his windows and cutting some creepers outside the house. Pursue the other witness who speaks to this transaction; represents that Lord William Hay declined to have anything to say to her. He says, "I told the sahib; he said, if she won't go send for the gaurd, as she was drunk and might strike me with the knife. I persuaded her to go home." That is all we know of that transaction, which certainly appears to their Lordships to be no evidence of adultery.

It has been already said that their Lordships are of opinion that the only evidence against Lord William Hay was that of the native witnesses. It is true that the Chief Court does speak of that evidence as being corroborated in one highly important particular by Mr. Johnson, the gentleman who was employed to get up the case. But their Lordships do not take the same view of the evidence of Mr. Johnson. The passage to which the Chief Court refers would appear to be this:—"One morning I was taking my early ride about 7 or 7-30. I saw Mrs. Gordon coming down the steps which lead out of Littlewood; the ayah was with her. I passed close to her, but did not speak; her heir was hanging down." It does not appear to their Lordships that the fact of Mr. Johnson meeting this lady between 7 and 8 o'clock in the morning in company with a maid walking down steps, which would seem to be public ones leading, it is true, to Lord William Hay's house but also to other places, does afford any corroborative evidence which can be relied on of the statements of the native witnesses.

The case, therefore, in their Lordships' view, as far as Lord William Hay is concerned, resolves itself into this: the only part of the evidence of any importance is that of a native servant who in 1862 denied all knowledge of what he asserted in 1869, and this servant is contradicted by a fellow servant whom he vouches. Lord William Hay must be taken, as the Chief Court of the Punjab properly assumes, to have given a general denial of the truth of this evidence; if that denial has not been specific, and has not been tested by cross-examination,

the fault, having regard to his desire to be examined on commission, cannot be regarded as his. Under these circumstances, their Lordships have come to the conclusion that this decree cannot be maintained.

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Their Lordships are not unmindful that they have on more than one occasion laid it down as a general rule, subject to possible exceptions, that they would not reverse the concurrent findings of two Courts on a question of fact. But they consider that the circumstances of this case are of so peculiar a character as to take it out of the scope of that general rule. They are dealing with a jurisdiction of an important and delicate character, new to the Courts of India. This is certainly the first case which has come before their Lordships, and probably not many suits of this description have been tried in India. It is to be observed that in this case it can scarcely be said that there have been two separate judgments, inasmuch as the Legislature has not thought it safe to entrust the Court below with the power of pronouncing decisions which would be binding if not appealed against, but have made these decisions operative only on confirmation by the High Court, whose confirmatory judgment is practically the judgment in the suit. It is further to be observed that the Court below was clearly wrong in accepting as evidence against Lord William Hay the statements of Mrs. Gordon, and regarding those statements as confirming the credibility of the evidence of the native witnesses against him. It is true that the Chief Court distinguishes between the evidence which was admissible as against the respondent, and that which was admissible as against the co-respondent. At the same time they attach a good deal of importance to the finding of the Judge below upon the credibility of the native witnesses, based as that finding was in a great measure upon evidence not admissible. For these reasons their Lordships have come to the conclusion that it is not one of the cases to which the ordinary rule abovementioned should be applied.

Their Lordships will, therefore, humbly advise Her Majesty to allow this appeal and to reverse so much of the decree of the Chief Court of the Punjab as is appealed against and that in

<div style="border-bottom: 1px solid black; padding-bottom: 2px;">1872</div> <div style="padding-bottom: 2px;">HAY</div> <div style="padding-bottom: 2px;">v.</div> <div style="padding-bottom: 2px;">GORDON.</div>	lien thereof the suit be dismissed as against Lord William Hay, with the costs in the Courts below and the costs of this appeal. <div style="text-align: right;"><i>Appeal allowed.</i></div>
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Agent for appellant . Mr. *Clements*.

Agents for respondent : Messrs. *Pritchard and Son*.

<div style="border-bottom: 1px solid black; padding-bottom: 2px;">P. C.*</div> <div style="padding-bottom: 2px;">1872</div> <div style="padding-bottom: 2px;">July 4, 5, 6,</div> <div style="padding-bottom: 2px;">[27.]</div>	MOLLWO, MARCH, AND OTHERS (PLAINTIFFS) v. THE COURT OF WARDS, ON BEHALF OF THE ESTATE OF RAJAH PERTAB CHUNDER SING (DEFENDANT).
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[On appeal from the High Court of Judicature at Fort William in Bengal.]

Partnership—Payment of Debt out of Profits—English Law.

Although a right to participate in the profits of trade is a strong test of partnership, and there may be cases where, from such participation alone, it may, as a presumption, not of law but of fact, be inferred, yet whether that relation does or does not exist must depend on the real intention and contract of the parties.

To constitute a partnership the parties must have agreed to carry on business and to share profits in some way in common ; but where a contract is entered into between partners and a third person for the protection of that person as a creditor, whereby it is agreed that he shall receive in consideration of advances commission on the net profits of the partnership business, and large powers of control over the business are given to him, but no power to direct transactions, the Court, if satisfied that the contract was one of loan and security, will not interpret it as constituting a partnership.

In applying the English law of partnership to cases in India the usages of trade and habits of business of the people of India, so far as they may be peculiar and differ from those in England, ought to be borne in mind.

THIS was an appeal from a decision of L. S. Jackson and Markby, JJ., dated the 18th June 1869, whereby they decided that Rajah Pertab Chunder Sing (who had died pending the suit, and whose estate was now represented by the Court of Wards) was not liable as a partner of the firm of Watson and Co. for the debts of that firm.

The facts are fully stated in the report of the case when before the High Court (1).

Present :—THE RIGHT HON'BLE SIR JAMES W. COLVILLE, SIR B. PEACOCK,
 SIR M. E. SMITH, SIR R. P. COLLIER, and SIR L. PEEL.

(1) 3 B. L. R., A C., 238.

The appeal, which now came on for hearing, was preferred by the creditors Messrs. Mollwo, March and Co.

The *Solicitor-General* (Sir G. Jessel), Q. C., Mr. Lindley, Q. C., and Mr. F. Meadows White for the appellants.—Previous to the agreement, the Rajah's position as to the Watsons' firm may have been simply that of a creditor; but after the agreement of August 1863 that position was altered, and thenceforth he became, at any rate as to third parties, a partner; and even if he cannot be said to be a true partner, the Watsons were authorized to pledge his credit, and he became jointly liable with them to creditors. The English law of partnership will apply. At the time of this debt being incurred the Statute 28 & 29 Vict., c. 86, had not been passed, and though it is not contended that that Act would have extended to India without express words, it has since in effect been so extended by Act XV of 1866. But the wording of the Statute is important, inasmuch as it by declaring that a loan made to a firm in consideration of a share of the profits shall not constitute a partnership, clearly points out that such a state of affairs up to that time would have constituted the lender a partner. The case of *Cox v. Hickman* (1) is decided on a different principle. That was a case simply deciding that the concurrence of creditors in an arrangement, under which they allowed their debtor or his trustees to continue his trade, applying the profits in discharge of their demands, did not make them partners. But here the trade has been carried on on behalf of the Rajah. The same distinction is to be found in *Helme v. Hammond* (2), *Redpath v. Wigg* (3), *Easterbrook v. Barker* (4). The effect of the decision in *Cox v. Hickman* (1) has been considered in *Kilshaw v. Jukes* (5). The older decisions clearly establish that participation in profits makes a person liable as a partner—*Waugh v. Carver* (6), *Grace v. Smith* (7), *Bond v. Pittard* (8), *Ex parte Wheeler* (9), *Ex parte Hamper* (10),

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(1) 8 H. L. C., 268.

(6) 2 H. Bl., 235.

(2) 7 L. R., Ex., 218.

(7) 2 W. Bl., 998.

(3) 1 L. R., Ex., 335.

(8) 3 M. & W., 357.

(4) 6 L. R., U. P., 1.

(9) Buck., 25.

(5) 3 B. & S., 847; 32 L. J., N. S.,

(10) 17 Ves., 403.

Q. B., 217.

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Ex parte Chuck (1), and *Barry v. Nesham* (2). The observations of Shee, J., in *Bullen v. Sharp* (3) are important. The learned Counsel also referred to *In re The English and Irish Church and University Assurance Society* (4), *Shaw v. Galt* (5), and the notes to *Waters v. Taylor* (6).

Sir R. Palmer, Q. C., Mr. H James, Q. C., and Mr. Doyne for the respondents.—The agreement was entered into by the parties as bearing the relation to each other of debtors and creditor, and was a provision for securing to the Rajah the payment of his debt. The old theory upon which *Waugh v. Carver* (7) was based cannot now be recognized as law. The cases of *Cox v. Hickman* (8) and *Bullen v. Sharp* (3) are decisive of this case. The High Court took a correct view of the cases in applying the principles laid down by the house of Lords. The learned Counsel also referred to Lindley on Partnership, p. 38, and the cases cited in the notes to *Waters v. Taylor* (6).

Their LORDSHIPS delivered the following judgment :—

The action which gives occasion to this appeal was brought by the plaintiffs (the appellants), merchants of London, against the late Rajah Pertab Chunder Singh, to recover a balance of nearly three lacs of rupees, claimed to be due to them from the firm of W. N. Watson and Co., of Calcutta. The Rajah having died during the pendency of the suit, the defence was continued by the respondents, the Court of wards, on behalf of his minor heir.

The plaint alleged that the firm of W. N. Watson and Co. consisted of William Noel Watson, Thomas Ogilvie Watson, and the Rajah, and sought to make the Rajah liable as a partner in it.

It may be assumed, although the exact amount is a question in dispute in the appeal, that a large balance became due from

(1) 3 Bing., 469.

(2) 3 O. B., 641 ; 16 L. J., N. S.,

C. P., 21.

(3) L. R., I C. P., 86.

(4) 1 H. & M., 85.

(5) 16 Ir. Com., L. R. 357.

(6) Tudor's L. Ca., 343.

(7) 2 H. Bl., 235.

(8) 8 H. L. C., 268.

the firm to the plaintiffs during the time when it is contended that the Rajah was in partnership with the two Watsons.

The questions in the appeal depend, in the main, on the construction and effect of a written agreement entered into between the Wastons and the Rajah ; but it will be necessary to advert to some extrinsic facts to explain the circumstances under which it was made and acted on.

The two Watsons commenced business in partnership, as merchants, at Calcutta, in 1862, under the firm of W. N. Watson and Co. Their transactions consisted principally of making consignments of goods to merchants in England, and receiving consignments from them. In January 1863, they entered into an agreement with the plaintiff regulating the terms on which consignments were to be made between them, and under which W. N. Watson and Co. were authorized, within certain limits, to draw on the plaintiffs in London against consignments. The Watsons had little or no capital. The Rajah supported them, and in 1862 and 1863 he made large advances to enable them to carry on their business, partly in cash, but chiefly by accepting bills, for which the Watsons obtained discount, and which the Rajah met at maturity. In the middle of 1863, the total amount of these advances was considerable, and the Rajah desired to have security for his debt, and for any future advances he might make, and also wished to obtain some control over the business by which he might check what he considered to be the excessive trading of the Watsons. Accordingly, an agreement was entered into on the 27th August 1863, between the Rajah of the one part, and " Messrs. W. N. Watson and Co.," of the other part, by which, in consideration of money already advanced, and which might be thereafter advanced by the Rajah to them, the Watsons agreed to carry on their business subject to the control of the Rajah in several important particulars which will be hereafter adverted to. They further agreed to, and in fact did, hand over to him "as security" the title-deeds of certain tea-plantations, and they also agreed that "as further security" all their other property, landed or otherwise, including their stock-in-trade, should be answerable for the debt due to him. The 10th and

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13th clauses of the argeement were as follows :—"10th.—In consideration of the said advances made and the liability incurred as aforesaid by the Rajah, and in consideration of any future advances which may be made by him, the firm agrees that he shall receive from them a commission of 20 per cent. on all net profits made by the firm from time to time, commencing from the first May 1862, or until such time as the whole amount of the debt due to him shall be paid off, and the liability so incurred by him as aforesaid shall be wholly extinguished."

"13th.—The firm shall, in addition to the said commission, pay to the Rajah interest at the rate of 12 per cent. per annum upon all cash advances which have been or are to be hereafter made by him to the firm, and shall also pay to the banks all discount and interest now or hereafter payable on the said acceptance." This agreement is not signed by the Rajah, but he was undoubtedly an assenting party to it. Subsequently to the agreement the Rajah made further advances, and the amount due to him ultimately exceeded three lacs of rupees.

In 1864 and 1865, the firm of W. N. Weston and Co. fell into difficulties. An arrangement was then made under which the Rajah, upon the Watsons executing to him a formal mortgage of the tea-plantations to secure the amount of his advances, released to them, by a deed bearing date the 3rd March 1865, all right to commission and interest under the agreement of August 1863, and all other claims against them. In point of fact, the Rajah up to this time had never received possession of any of the property or moneys of the firm, nor any of the proceeds of the business, and did not infact receive any commission. A sum of 27,000 rupees on this account was, indeed, on the 30th September 1863, placed to his credit in the books of the firm in a separate account opened in his name, but the sum so credited was never paid to him, and was subsequently "written back" by the Watsons. Some evidence was given as to the extent of the interference of the Rajah in the control of the business. It seems the Rajah knew little of its details, and it is unnecessary to go, with any minuteness, into the facts on this part of the case; for it was couceded that the Rajah availed himself only in a slight degree of the powers of control con-

ferred upon him by the agreement ; in fact, that he did not more, but much less, than he might have done under it, so that the question really turns on the effect of the contract itself. The subsequent acts of the Rajah do not in any way add to or enlarge his liability.

Before proceeding to the main questions which have been argued in the appeal, it may be as well to clear the way for their consideration by saying that no liability can in this case be fastened upon the Rajah on the ground that he was an ostensible partner, and therefore liable to third persons as if he was a real partner. It is admitted that he did not so hold himself out ; and that a statement made by one of the Watsons to the plaintiffs, to the effect that he might be in law a partner, by reason of his right to commission on profits, was not authorized by the Rajah. The liability therefore of the Rajah for the debts contracted by W. N. Watson and Co. must depend on his real relation to that firm under the agreement.

It was contended, for the appellants, that he was so liable :

1. Because he became by the agreement, at least as regards third persons, a partner with the Watsons ; and

2. Because, if not " a true partner" (the phrase used by Mr. Lindley in his argument), the Watsons were the agents of the Rajah in carrying on the business ; and the debt to the plaintiffs was contracted within the scope of their agency.

The case has been argued in the Courts of India and at their Lordships' bar, on the basis that the law of England relating to partnerships should govern the decision of it. Their Lordships agree that, in the absence of any law or well-established custom existing in India on the subject, English law may properly be resorted to in mercantile affairs for principles and rules to guide the Courts in that country to a right decision. But whilst this is so, it should be observed that in applying them, the usages of trade and habits of business of the people of India, so far as they may be peculiar and differ from those in England, ought to be borne in mind.

The agreement, on the face of it, is an arrangement between the Rajah, as creditor, and the firm consisting of the two Watsons, as debtors, by which the Rajah obtained security for his past

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advances ; and in consideration of forbearance, and as an inducement to him to support the Watsons by future advances, it was agreed that he should receive from them a commission of 20 per cent. on profits, and should be invested with the powers of supervision and control above referred to. The primary object was to give security to the Rajah as a creditor of the firm. It was contended at the bar that, whatever may have been the intention, a participation in the net profits of the business was, in contemplation of law, such cogent evidence of partnership that a presumption arose sufficient to establish, as regards third parties, that relation, unless rebutted by other circumstances. It appears to their Lordships that the rule of construction involved in this contention is too artificial, for it takes one term only of the contract and at once raises a presumption upon it, whereas the whole scope of the agreement, and all its terms, ought to be looked at before any presumption of intention can properly be made at all.

It certainly appears to have been at one time understood that some decisions of the English Courts had established, as a positive rule of law, that participation in the net profits of a business made the participant liable as a partner to third persons. (See this pointedly stated by Blackburn, J., in *Bullen v. Sharp* (1). The rule had been laid down with distinctness by Eyre, C.J., in *Waugh v. Carver* (2), and the reason of the rule the Chief Justice thus states :—" Upon the principle that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts. That was the foundation of *Grace v. Smith* (3), and I think it stands upon fair grounds of reason." The rule was evidently an arbitrary one, and subsequent discussion has led to the rejection of the reason for it as unsound. Whilst it was supposed to prevail, much hardship arose from its application, and a distinction, equally arbitrary, was established between a right to participate in profits generally " as such," and a right to a payment by way of salary or commission " in proportion " (to use the words of Lord Eldon) " to a given

(1) L. R., 1 C. P. 86 see 10L. (2) 2 H. Bl., 235, see 247. (3) 2 W. Bl., 998.

quantum of the profits." This distinction was stated to be "clearly settled" and was acted upon by Lord Eldon in *Ex parte Hamper* (1) and in other cases. It was also affirmed and acted on in *Pott v. Eyton* (2), where Tindal, C.J., in giving the judgment of the Court, adopts the rule as laid down by Lord Eldon, and says :—" Nor does it appear to make any difference whether the money is received by way of interest on money lent, or wages, or salary as agent, or commission on sales." The present case appears to fall within this distinction. The Rajah was not entitled to a share of the profits "as such;" he had no specific property or interest in them *quod* profits, for, subject to the powers given to the Rajah by way of security, the Watsons might have appropriated or assigned the whole profits without any breach of the agreement. The Rajah was entitled only to commission, or a payment equal in proportion to one-fifth of their amount. This distinction has always been admitted to be thin, but it may be observed that the supposed rule itself was arbitrary in the sense of being imposed by law and of being founded on an assumption opposed in many cases to the real relation of the parties; and when the law thus creates a rule of liability and a distinction, both equally arbitrary, the distinction which protects from liability is entitled to as much weight as the rule which imposes it.

But the necessity of resorting to these fine distinctions has been greatly lessened, since the presumption itself lost the rigid character it was supposed to possess after the full exposition of the law on this subject contained in the judgment of the House of Lords in *Cox v. Hickman* (3), and the cases which have followed that decision. It was contended that these cases did not overrule the previous ones. This may be so, and it may be that *Waugh v. Carver* (4), and others of the former cases, were rightly decided on their own facts; but the judgment in *Cox v. Hickman* (3) had certainly the effect of dissolving the rule of law which had been supposed to exist, and laid down principles of decision by which the determination of cases of this kind

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(1) 17 Ves. 403, see 412.

(2) 3 C. B., 32.

(3) 8 H. L. C., 268.

(4) 2 H. Bl., 235.

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is made to depend, not on arbitrary presumptions of law; but on the real contracts and relations of the parties. It appears to be now established that, although a right to participate in the profits of trade is a strong test of partnership, and that there may be cases where, from such participation alone, it may, as a presumption, not of law but of fact, be inferred, yet that, whether that relation does or does not exist, must depend on the real intention and contract of the parties.

It is certainly difficult to understand the principle on which a man who is neither a real nor ostensible partner can be held liable to a creditor of the firm. The reason given in *Grace v. Smith* (1), that by taking part of the profits he takes part of the fund which is the proper security of the creditors, is now admitted to be unsound and insufficient to support it; for of course the same consequences might follow in a far greater degree from the mortgage of the common property of the firm, which certainly would not of itself make the mortgagee a partner. Where a man holds himself out as a partner, or allows others to do it, the case is wholly different. He is then properly estopped from denying the character he has assumed, and upon the faith of which creditors may be presumed, to have acted. A man so acting may be rightly held liable as a partner by estoppel. Again, wherever the agreement between parties creates a relation which is in substance a partnership, no mere words or declarations to the contrary will prevent, as regards third persons the consequences flowing from the real contract.

Numerous definitions by text-writers of what constitutes a partnership are collected at the end of the introduction to Mr. Lindley's excellent treatise on this subject. Their Lordships do not think it necessary to refer particularly to any of them, or to attempt to give a general definition to meet all cases. It is sufficient for the present decision to say, that to constitute a partnership, the parties must have agreed to carry on business, and to share profits in some way in common.

It was strongly urged, that the large powers of control, and the provisions for empowering the Rajah to take possession of

(1) 2 W. Bl., 998.

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the consignments and their proceeds, in addition to the commission on net profits, amounted to an agreement of this kind, and that the Rajah was constituted, in fact, the managing partner. The contract undoubtedly confers on the Rajah large powers of control. Whilst his advances remained unpaid, the Watsons bound themselves not to make shipments or order consignments, or sell goods without his consent. No money was to be drawn from the firm without his sanction, and he was to be consulted with regard to the office business of the firm, and he might direct a reduction or enlargement of the establishment. It was also agreed that the shipping documents should be at his disposal, and should not be sold or hypothecated, or the proceeds applied without his consent; and that all the proceeds of the business should be handed to him, for the purpose of extinguishing his debt. On the other hand, the Rajah had no initiative power; he could not direct what shipments should be made or consignments ordered, or what should be the course of trade. He could not require the Watsons to continue to trade, or even to remain in partnership; his powers, however large, were powers of control only. No doubt he might have laid his hands on the proceeds of the business; and not only so, but it was agreed that all their property, landed and otherwise, should be answerable to him as security for his debt. Their Lordships are of opinion that by these arrangements the parties did not intend to create a partnership, and that their true relation to each other under the agreement was that of creditor and debtors. The Watsons evidently wished to induce the Rajah to continue his advances, and, for that purpose, were willing to give him the largest security they could offer; but a partnership was not contemplated, and the agreement is really founded on the assumption, not of community of benefit, but of opposition of interests. It may well be that, where there is an agreement to share the profits of a trade, and no more, a contract of partnership may be inferred, because there is nothing to show that any other was contemplated; but that is not the present case, where another and different contract is shown to have been intended, *viz.*, one of loan and security.

Some reliance was placed on the Statute 28 & 29 Vict.,

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e. 86, which enacts that the advance of money to a firm upon a contract that the lender shall receive a rate of interest varying with the profits, or a share of the profits, shall not, of itself constitute the lender a partner, or render him responsible as such. It was argued that this raised an implication that the lender was so responsible by the law existing before the passing of the Act. The enactment is no doubt entitled to great weight as evidence of the law, but it is by no means conclusive ; and when the existing law is shown to be different from that which the Legislature supposed it to be, the implication arising from the Statute cannot operate as a negation of its existence. What may be the effect of the positive enactment contained in the fifth clause of the Act, so far as regards England, it is not necessary for their Lordships to consider. The Indian Act, XV of 1866, passed after this contract was made, does not contain that provision.

It was strongly insisted for the appellants that if "a true partnership" had not been created under the agreement, the Watsons were constituted by it the agents of the Rajah to carry on the business, and that the debt of the plaintiffs was contracted within the scope of their agency.

Of course, if there was no partnership, the implied agency which flows from that relation cannot arise, and the relation of principal and agents must, on some other ground, be shown to exist. It is clear that this relation was not expressly created, and was not intended to be created by the agreement, and that, if it exists, it must arise by implication. It is said that it ought to be implied from the fact of the commission on profits, and the powers of control given to the Rajah. But this is again an attempt to create, by operation of law a relation opposed to the real agreement and intention of the parties, exactly in the same manner as that of partners was sought to be established, and on the same facts and presumptions. Their Lordships have already stated the reasons which have led them to the conclusion that the trade was not agreed to be carried on for the common benefit of the Watsons and the Rajah, so as to create a partnership ; and they think there is no sufficient ground for holding that it was carried on for the Rajah, as principal, in any other charac-

ter. He was not, in any sense, the owner of the business, and had no power to deal with it as owner. None of the ordinary attributes of principal belonged to him. The Watsons were to carry on the business ; he could neither direct them to make contracts, nor to deal with particular customers, nor to trade in the manner which he might desire : his powers were confined to those of control and security ; and subject to those powers, the Watsons remained owners of the business and of the common property of the firm. The agreement in terms, and, as their Lordships think, in substance, is founded on the relation of creditor and debtors, and establishes no other.

Their Lordships' opinion in this case is founded on their belief that the contract is really and in substance what it professes to be, *viz.*, one of loan and security between debtors and their creditor. If cases should occur where any persons, under the guise of such an arrangement, are really trading as principals, and putting forward as ostensible traders others who are really their agents, they must not hope by such devices to escape liability ; for the law, in cases of this kind, will look at the body and substance of the arrangements, and fasten responsibility on the parties according to their true and real character.

For the above reasons their Lordships think that the Judges of the High Court, in holding that the Rajah was not liable for the debts of the firm of W. N. Watson and Co., took a correct view of the case : and they will, therefore, humbly advise Her Majesty to affirm their judgment, and to dismiss this appeal with costs.

Appeal dismissed.

Agents for appellants : Messrs *Hillyer, Fenwick and Stibbard.*

Agent for respondent : Mr. *Wrentmore.*

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APPELLATE CIVIL.

Before Mr. Justice Bayley and Mr. Justice Mitter.

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RAJ NARAIN DEB CHOWDHRY (PLAINTIFF) v. KASSEECHUNDER CHOWDHRY AND OTHERS DEFENDANTS).*

Guardian and Infant—Sale by Guardian—Delay in repudiating a Guardian's act—Ratification of Contract made by Guardian.

Mere delay on the part of a ward, after attainment of majority, in repudiating an alienation made by his guardian, cannot be treated as a ratification of the guardian's act, but only as evidence of ratification.

ONE Bhobanipersaud, a Hindu, died, leaving a widow Chunderbutty Dossee, and a minor grandson by his daughter, named Chundernath, and leaving amongst other property an eight-anna share of 21 *hals* of land. On the death of Chunderbutty, Chundernath succeeded to the property left by Bhobanipersaud. During the minority of Chundernath, his father, Saheb Roy, as the guardian of his minor son, executed an *izarah pottah* of the eight-anna share of the land in favor of Kasseechunder Chowdhry and others, who obtained possession of the land on the 4th November 1857. Chundernath, a few days after attaining his majority, executed on the 26th February 1862 a deed of sale of a four-anna share of the property to Rajnarain Deb, therein reciting that the *izarah pottah* was in reality an out-and-out sale of the property; that there was no necessity to justify the sale; and that the sale by his guardian was "illegal and invalid."

On the 4th October 1869, Rajnarain brought the present suit for recovery of possession of the land let in *izarah* to Kasseechunder Chowdhry and others, stating in the plaint that the cause of action arose on the 4th November 1857. The defence set up was (*inter alia*) that the *izarah pottah* had been executed

* Special Appeal, No. 120 of 1872, from decree of the Judge of Sylhet, dated the 16th August 1871, reversing a decree of the Moonsiff of that district, dated the 28th February 1871.

to raise money for payment of debts incurred by Bhubani-persaud, that it was executed under a legal necessity, and that, after attaining majority, Chundernath, having purchased two *kears* of the land mentioned in the izarah pottah from the defendants, and then sold them to a third party, must be held to have admitted the validity of the izarah pottah.

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The Moonsiff found that there was no legal necessity which would justify the alienation; that the alienation was in no way beneficial to the minor; that the purchase and sale by Chundernath of the two *kears* of land took place after the plaintiff's purchase, and consequently could not affect his title; that Chundernath sold the one-fourth share immediately after attaining majority; and that there was no act done by Chundernath to ratify the alienation. He accordingly passed a decree in favor of the plaintiff.

On appeal, the Judge held that the case of necessity, set up by the defendants, had not been proved; that the long silence of Chundernath was a ratification of the act of his guardian; that if a minor, on attaining majority, did not repudiate any illegal sale by his guardian, nor communicate his intention of questioning his guardian's act to the purchaser, the mere circumstance of his having sold a portion of the property to a third party within five years after he attained majority, stating in the deed of sale that he repudiated his guardian's act to which the defendants were not parties, was no repudiation; and that the long silence of Chundernath and the plaintiff after his purchase was to be considered to be a ratification of the alienation by Chundernath's guardian. He accordingly dismissed the plaintiff's suit.

The plaintiff appealed to the High Court.

Mr. Woodroffe (Baboo Aushootosh Dhur with him) for the appellant.

Baboos Mohini Mohun Roy and Bykuntnath Doss for the respondents.

Mr. Woodroffe contended that there was no ratification on the part of Chundernath. Ratification implies an intelligent consent with knowledge of what has been done. The sale of

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Chundernath to the plaintiff was sufficient to question the legality of the sale by his guardian. Nothing short of twelve years will bar the plaintiff, who is a purchaser from one who is *sui juris*, and does not stand in the relation of a ward. The doctrine of ratification does not apply to a case where there is an end of the fiduciary relation. The equitable doctrine of acquiescence does not apply to suits in the Mofussil for which a period of limitation is provided—*Rámá Rau v. Rájá Rau* (1). When the right is founded upon law, the bar must be under the law, and cannot be subject to any equitable bar.

Baboo *Mohini Mohun Roy* for the respondents contended that there was acquiescence. The act of the guardian was not void, but voidable only. The silence of Chundernath for such a considerable length of time after attaining majority was ratification—*Boidonath Dey v. Ramkishore Dey* (2). There must be

(1) 2 Mad. Rep., 114.

(2) *Before Mr. Justice Phear and Mr. Justice Mitter.*

BOIDONATH DEY (DEFENDANT) v.
 RAMKISHORE DEY (PLAINTIFF).*

The 11th February 1870.
Minor, contract by—Delay in repudiating—Ratification.

Baboo *Nilmadhuh Sein* for the appellant.

The respondent did not appear.

The following judgments were delivered:

PEAR, J.—In this case the plaintiff admits that he sold the property, which he now seeks to recover, to the defendant, and received the purchase-money. But he says that, at the time when he sold it, he was a minor, consequently the contract was a void contract, and he is now entitled to recover back from the defendant the property which he so sold.

The lower Appellate Court holds that he is entitled to recover back the property thus sold, and has given a decree against the defendant to that effect; and inasmuch as this decree is not accompanied by any order that the plaintiff should refund the purchase-money which he has undoubtedly put into his pocket, the result will be that the decree, if allowed to stand, will give a legal sanction to that which is nothing more or less than robbery. It is obvious that this must be wrong. Let us look at the facts. According to the judgment of the lower Appellate Court, although the plaintiff was a minor at the time of the sale, he was then within a very few months of his majority, and since that time so long a period has elapsed, that the present suit only escapes being barred by a single month. In other words, the plaintiff for eleven years after he became a major stood by, and allowed the defendant to quietly enjoy possession of the land, which is the subject of suit, under the contract which he now seeks to set aside.

* Special Appeal, No. 2846 of 1869, from a decree of the Additional Subordinate Judge of Mymensing, dated the 8th September 1869, reversing a decree of the Munsif of that district, dated the 24th December 1868.

some prompt act to repudiate the alienation, otherwise ratification must be presumed—*Doorga Churn Shaha v. Ramnarain Doss* (1).

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Now a contract which is made by a minor is voidable only; it is not necessarily void; and if it has been made for a consideration, which was of the nature of a necessary to the minor, it is not even voidable. I think that when, as is the case here, a minor chooses to remain quiet for eleven years, after he has attained his majority, and for eleven years and eleven months after the contract, without doing anything in any shape to repudiate it, a Court of Equity is bound as against him to presume that the consideration for the contract was of such a character as to bind him, or that he had after coming of age ratified the contract, unless this long period of silence can be explained, or the original contract impeached upon grounds going to its merits, other than that of the minority of the vendor.

No sort of suggestion appears to have been made in this case that there was any good reason for the plaintiff's long silence, or that the contract of sale was not *bonâ fide* on the part of the defendant.

I am, therefore, of opinion that the lower Appellate Court was wrong in setting aside the sale. Even had there been good ground for doubting the binding character of the contract of sale, it ought not to have been set aside on any other terms than that of the plaintiff's refunding the purchase-money. As I have said, I am of opinion that the decision of the lower Appellate Court is wrong, and ought to be reversed, and it must accordingly be reversed with costs both in this Court and the Court below.

MITTIE, J.—I concur. I am not quite sure that the plaintiff's suit is not barred by the provisions of cl. 16, s. 1, Act XIV of 1859. It is true that the plaintiff has sued for the recovery of an immoveable property, but his right to that property is dependent on his right to have the sale by which it

was transferred to the defendant set aside. The law has not laid down any specific period of time for an action to set aside such a sale, and I am, therefore, inclined to think that the plaintiff's suit, so far as it relates to the reversal of that sale, would be barred by the provisions of the clause above referred to; and if he is not in a position to have that sale set aside, his claim for the recovery of the immoveable property in question must necessarily fall to the ground.

But I would add that I entirely concur in the opinion of my learned colleague that the plaintiff is not entitled to succeed in this action in consequence of his silence for eleven years, which has not been explained in any manner whatever, and which may be therefore taken as a sufficient ratification of the sale.

The decree of the lower Appellate Court must be reversed with costs.

(1) *Before Mr. Justice Phear and Mr. Justice Mitter.*

DOORGA CHURN SHAHA (ONE OF THE DEFENDANTS) v. RAMNARAIN DOSS (PLAINTIFF).*

The 14th February 1870.

Minor, contract by—Delay in repudiating—Ratification.

Baboo Grish Chunder Ghose for the appellant.

Baboo Rajender Nath Boss for the respondent.

THE judgment of the Court was delivered by,

PHEAR, J.—We think that the decision of the lower Appellate Court cannot be supported.

The plaintiff claims through two roots

* Special Appeal, No. 2604 of 1869, against the decree of the Judge of Sylhet, dated the 24th August 1869 affirming a decree of the Munsif of that district, dated the 30th April 1869.

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Long inaction must be held to be a ratification of the contract—

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of title, and the defendant sets up a prior right through the same sources.

It is not quite clear whether or not the plaintiff has proved the conveyances on which he relies. We think, however, that the decision of the Judge to the effect that the defendant has failed to make out his two lines of title is incorrect, at any rate as regards one of them.

It appears to us that there has been no real question below with regard to the defendant's conveyances. One portion of the property was conveyed to him by Surroop, another by Bishen Dassee.

But the Judge finds as a fact that Surroop was a minor, and upon that ground holds that the conveyance by him to the defendant is inoperative.

This we think is erroneous. A conveyance by a minor is so far imperfect that it may be avoided by the minor when he comes of age. But, unless after coming of age, he promptly does some act to repudiate the contract, it must be taken against him that he ratifies it.

It does not appear that there is a particle of evidence on the record tending to show that Surroop, when he came of age, or as soon thereafter as reasonably might be, took steps to repudiate the conveyance to the defendant. Of course, he could not honestly disavow his own act, unless he offered at the same time to refund the purchase-money.

Now nobody seems to have thought of his doing this. Even the plaintiff who sues on a conveyance from him, and therefore stands upon his right, and no other, never proposes to pay back to the defendant the money which he gave for his purchase. And the Judge, when he gives a decree in favor of the plaintiff, allows him to have the full benefit of the property without making any awards whatever to the defendant for the loss of the money which he paid some three and a half or four years before suit for the property.

I need not say that this of itself is inequitable. It would be manifestly unjust that Surroop should get back the property, and at the same time keep in his pocket the money for which he sold it; and there is nothing certainly in this case by reason of which the plaintiff ought to stand in a better position than Surroop. I have no doubt that the Court was bound in equity to treat the sale of Surroop to the defendant as a valid sale. If Surroop was of age at the time of the sale, he could not afterwards recall his act. If he was a minor which, on the finding of the Judge himself, is at any rate doubtful, everything in the case, including the mode in which the suit is brought, goes to prove that he ratified that sale, and he has certainly taken no step whatever to repudiate it. With regard to the property which the defendant obtained from Bishen Dassee, the Judge was not correct in holding that the production of the *kobala* was necessary to enable him to determine the issue between the parties in favor of the defendant.

It appears that the *factum* of sale was not really disputed, but the plaintiff only urged that the sale was a sale by a Hindu widow under circumstances which did not bind the reversionary heir. The Judge ought to have confined himself to the enquiry whether the sale by Bishen Dassee was valid as against the reversionary heir. He ought not to have gone behind the only question which the parties raised, to enquire whether there was such a sale or not.

We think that, so far as regards the property which was the subject of the conveyance of Surroop, the decision of both the lower Courts must be reversed, and the plaintiff's suit must be dismissed.

But as regards the property which was the subject of the conveyance from Bishen Dassee the decision of the lower

Mr. *Woodroffe* in reply.

The judgment of the Court was delivered by

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MITTER, J.—The main questions which the lower Courts had to determine in this case were, firstly, whether there was any legal necessity to justify the guardian of the plaintiff's vendor in mortgaging the disputed property to the defendants; and secondly, whether the plaintiff's vendor, Chundernath, after arriving at majority, had, previous to the sale to the plaintiff, ratified the said transaction of mortgage.

With reference to the first question, the lower Appellate Court has found as a fact upon evidence that the case of necessity set up by the defendants, special respondents, in their written statement, was not proved to its satisfaction. This finding has been impugned by the special respondents under the provisions of s. 348, Act VIII of 1859. But as it is a finding of fact based upon a full consideration of the evidence on the record, and as we do not find any error in law, either in the procedure or in the investigation of the case, we cannot interfere with it in special appeal.

Upon the second question, the lower Appellate Court has come to the conclusion that the plaintiff's vendor, having failed to take any steps to repudiate the defendants' title under the mortgage within five years after the date of his arrival at majority, it must be presumed that he has ratified that title.

We are of opinion that, under the admitted circumstances of this case, this conclusion is erroneous in law. We do not mean to say, that long silence on the part of a person, arrived at majority, to impugn the validity of a transaction between his lawful guardian during his minority and a third party, cannot be treated as evidence of ratification, merely because that silence falls short of the period prescribed by the Statute of Limitation; nor do we mean to say that a Court of Justice, whose duty it is to determine a question of fact, cannot, in any case, infer a Appellate Court must be reversed, and then next reversionary heir consented to the sale.

Appellate Court for trial of the issue, whether or not the consideration for that sale was such as to make the sale binding as against the reversionary heir; or, in the alternative, whether the

We think that the plaintiff must pay the defendant one-third of his costs in both the lower Courts and in this Court. The remaining costs will abide the result of the inquiry on remand.

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ratification from the fact of such silence. But after a careful consideration of all the arguments and authorities brought to our notice, the conclusion we have arrived at is that mere silence for a period short of that prescribed by the law of limitation cannot by itself constitute a valid ground for rejecting a person's claim to set aside an alienation improperly made by his guardian without any valid necessity. Such a course would be tantamount to the establishment of a new rule of limitation not sanctioned by the Statute, and it is therefore clear that mere delay in repudiating an alienation like that above described can be treated only as evidence of ratification, if such ratification is pleaded, and in no other light.

Let us now proceed to see how the lower Appellate Court has dealt with the delay imputed in this case to the plaintiff's vendor, that delay being considered merely as a matter of evidence bearing upon the question of ratification. The learned Judge admits in his decision that, as soon as the plaintiff's vendor arrived at majority, he sold his rights in a moiety of the lands mortgaged to the defendants to the plaintiff, and in the kobala executed for that purpose, he, the plaintiff's vendor, expressly repudiated the title of the defendants and characterized the possession held under that title as wrongful. But the learned Judge goes on to say that the defendants were not parties to this kobala, and as neither the plaintiff nor his vendor gave to the defendants any notice of their intention to repudiate the mortgage transaction in question within five years and upwards from the date of its execution, it must be held that that transaction has been sufficiently ratified by the plaintiff's vendor, and therefore as a matter of law by the plaintiff himself, who cannot claim to stand in a higher position than his vendor.

But this reasoning appears to us to be erroneous. In the first place it seems to be clear that there is no law which requires a person who has arrived at majority to give any notice, express or implied, to the person who holds his property under an invalid alienation made by his guardian during his minority; nor do we find any law providing that a suit of this description cannot be maintained without the performance of some preliminary acts on the part of the minor, or of those who claim under him.

In the next place, it is clear from the foregoing remarks that the question which the Judge had to try was, whether the title relied upon by the defendants had been ratified by the plaintiff's vendor, there being no allegation in this case that it had been ratified by the plaintiff himself; and it may be conceded that in dealing with this question, the Judge had every right to draw any legitimate inference he thought proper from the conduct of the parties, such as the delay on the part of the plaintiff or of his vendor in taking proceedings against the defendants. But in this case, it is admitted that there is no direct evidence of any positive act of ratification. There may be cases in which mere silence for an undue length of time may be taken as proof of such an act. But in this case, it is clear upon the learned Judge's own showing that there was something more than silence, namely, the express repudiation of the defendants' title in the kobala executed in favour of the plaintiff by his vendor immediately after the latter's arrival at majority. That kobala is, at any rate, evidence of the declared intention of the plaintiff's vendor to institute proceedings against the defendants, at least of an intention existing on the date of its execution, and there is therefore direct evidence not of ratification, but of positive dis-affirmance or repudiation. It is not even alleged that there has been any ratification by the plaintiff since that date, the acts of his vendor done subsequently to the date of his purchase being of course rejected as not binding against him.

In the above view, we reverse the decision of the Judge, and restore that of the first Court with all costs to be paid by the defendant, mortgagee.

Appeal allowed.

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APPELLATE CRIMINAL.

Before Mr. Justice Phear and Mr. Justice Ainslie.

THE QUEEN v. SOOBIAN.*

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Jan. 14.

Evidence—Confession of Guilt—Credibility of Confession—Documents not in Evidence before Sessions Judge.

The words actually used by an accused, who is said to have confessed, ought to be ascertained. The Court should not accept merely the conclusions at which the witnesses, deposing to a confession, themselves arrived, from the answers which the accused gave to questions put by them.

Where an accused makes two distinct statements,—the one amounting to a confession of guilt, the other repudiating guilt,—if the one statement is taken against the accused, the other also must be taken, for what it is worth, in his favor. The Court ought to weigh well the relative credibility of the two statements before it accepts the one in preference to the other.

Documents which were in the record sent up by the Magistrate, but which were not put in evidence before the Sessions Judge, were looked at because they told in favor of the prisoner.

THE prisoner in this case was charged, under s. 302 of the Indian Penal Code, with culpable homicide amounting to murder, by causing the death of Gani, her husband, and was tried before the Judge of Dinagepore with the aid of assessors.

The evidence against the prisoner was that of two witnesses, and her own statement before the Magistrate.

The first witness, Mahashun, said :—

“My brother Gani is dead. He died from poison given him by his wife, the prisoner present, on a Tuesday evening. I lived in the same house with my brother. I ate that night rice and vegetable prepared by the prisoner; my brother Gani ate after me. He said after eating that he was burning inside and his tongue dry. He was in perfect health before; he shortly after vomited, and died at midnight. He took his food about 9 p. m. I asked the prisoner after his death what she had done, and she said she had given him poison in his rice. She said that Majnoo had enticed her to poison her husband as she

* Criminal case No. 977 of 1872, referred to the High Court for confirmation of the capital sentence by the Sessions Judge of Dinagepore.

had an intrigue with him. She pointed out the small piece of cloth present, and said she had received the poison in that cloth. The body was sent into the station in charge of the Police and my Brother Halal, Raiaboolah and Jeetoo and others. I sent the chowkedar to the thannah 18 miles off. The Police came on the Thursday, and the body was sent in on Friday. The prisoner confessed to the Police as she did to us. I knew nothing of any intrigue between the prisoner and Majnoo. He lives near prisoner's mother, in the Purneah district. My brother was a strong, healthy man. Halal and other villagers saw my brother in the dying state; he was rolling about in great pain. He said he believed his wife had poisoned him. She was then in the house and said nothing."

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Halal, the second witness said :—

"Gani was my brother. He is dead; he was poisoned by his wife Soobjan on Tuesday night. The prisoner present is the wife of Gani. I and my brother ate first. The food was cooked by the prisoner. My brother Gani ate after us. He shortly after said he had a bad taste, and his throat and stomach were burning. He fell down and rolled about and died in great pain at midnight, having eaten about 9 p. m. His wife confessed to us that she had given him poison which Majnoo had given her, as she had an intrigue with him and would marry him when her husband was dead. She said she had the poison in the piece of cloth now present. Majnoo lives across the river. The deceased was healthy and strong; he had not eaten anything before the rice. He believed his wife had poisoned him. The Police came on the Thursday. The chowkedur went to the thannah on Wednesday morning, 7 kos distant. The prisoner confessed to having poisoned her husband before the Police. His wife was present when Gani accused her, and she made no reply. The prisoner during Falgoon and Magh was at her mother's house, 3 *rusis* from Majnoo. The body was sent in in charge of the Police. Raiaboolah and 8 men took it in. Gani has no other wife."

The prisoner's statement before the Magistrate was then read to her. It was as follows :—

"Majnoo is my brother-in-law's brother. Since last Falgoon there has been an intrigue existing between us. One Monday, 10 or 15 days ago, he gave me some white powder poison, and said that he would keep me if I would give the poison to my husband with rice, which, if he takes it, will cause his death. This led me to give poison to my husband on Tuesday with rice; he took it, and said that his tongue was very bad. So saying he vomited and fell down, and died at midnight. I gave

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the rice at one *pahar* of night. Very little quantity of powder poison was given in a piece of rag (produced in the Court). The powder was wrapped in this rag, not tied.

The prisoner was asked if her "confession" was true. She answered as follows :—

"The confession is not true. My elder brother-in-law induced me to say what I did. My husband was ill with venereal disease, and Majnoo gave me medicine for him: this I gave him. I had no intrigue with Majnoo. I gave the medicine to cure and not to kill him. I have no more to say and no witnesses."

It appeared that no *post-mortem* examination had been made, but the stomach, which had been sent to Calcutta, had been examined and was found not to contain any poison. With the documents sent up with the record there was a report by the Civil Surgeon of Dinagepore, who had apparently, at the Magistrate's request, examined Majnoo and Soobjan, both prisoners at the time, stating that Majnoo was free from both venereal disease and gonorrhœa, but that the prisoner was suffering from gonorrhœa, that she had been under treatment from the time of her admission and that she was not yet quite cured. The doctor, however was not examined as a witness, now was his report produced before the Sessions Court, or mentioned by the Judge in his judgment.

The assessors were of opinion that the evidence was not sufficient for a conviction, the body having been examined and no poison having been found in the stomach. They both thought it possible that the prisoner had been induced to confess to the Magistrate by others, and they found her not guilty. The Judge considered that the evidence was supported by her voluntary confession, and convicted the prisoner and sentenced her to death.

On the case coming up to the High Court for confirmation of the sentence under s. 287 of the Criminal Procedure Code, no one appeared for the prisoner

The following judgments were delivered :—

PHEAR, J.—In this case the prisoner has been convicted of murder by the Sessions Judge differing from the assessors, and the prisoner has been sentenced to death.

The assessors are of opinion that the evidence is not suffi-

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cient to support a conviction and the Judge himself states that the case has been sent up in rather a meagre form. And truly the materials upon which the conviction has been come to are about the very scantiest that I have ever before seen in a capital case. Apart from statements which the prisoner herself on different occasions made, the whole of the evidence directly bearing upon the charge is as follows :—[His Lordship, after reading portions of the evidence of the two witnesses continued.] —This is the whole of the material evidence in the case, exclusive of the prisoner's confessions. But both these witnesses no doubt stated that the prisoner confessed to having poisoned her husband. The words are these :—Mahashun says, " I asked the prisoner after his death what she had done, and she said she had given him poison in his rice. She said that Majnoo had induced her to poison her husband as she had an intrigue with him." Halal said :—" His wife confessed to us that she had given him poison which Majnoo had given her, as she had an intrigue with him and would marry him when her husband was dead."

Now, it is to be observed that these statements are in general terms, and so are merely statements of a conclusion at which the witnesses themselves arrived from the answers given by the prisoner to their questions. Halal says, " she confessed," but it is all important in matters of this kind to know what were the words which the person who is said to have confessed actually used : nothing short of the actual words given in detail in the first person, so far as it is possible to obtain them, ought ever to be relied upon as a foundation for the opinion formed by the Court ; because, it may turn out that the words taken together with the questions and the circumstances under which the questions were put, do not in truth amount to a confession of guilt such as the witness chose to represent it. Neither of these witnesses are asked to detail their questions or even to give the actual words of the prisoner ; and I must say that I should like very much indeed to have on the record even the vernacular expressions which were used, and which the Judge has translated by saying, " she said she had given him poison in his rice." It is quite certain, I think, that all which passed between these brothers of the deceased and the wife cannot possibly be given in these

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depositions, assuming anything passed at all, because I feel confident that if the woman had deliberately poisoned her husband with the motive attributed to her, she would not, immediately upon his death, without anything more than that which appears in these depositions, have voluntarily made a clean breast of it, saying openly that she poisoned him because she had an intrigue with another man, and that other man had promised to keep her. It seems to me quite beyond belief that these depositions do represent all that passed, if anything passed, in this respect. I have also reason for thinking that these depositions do not even represent all that the witnesses stated in Court, for I find that the Judge in his judgment while stating the facts as he understood them, says:—"The two witnesses, Mahashan and Halal, were two of his brothers, and came home before him, on the night in question, and ate their food as usual that had been cooked by the prisoner. Their brother Gani, deceased, came in after them." In the depositions, as they stand on the record, there is nothing from which I can get these particulars—though they are certainly material to the case of the prosecution; and I suppose the Judge did not invent them. Again, somewhat later he says:—"The occurrence happened at a great distance, 16 or 18 miles from the thannah; and the thannah itself 36 miles from the station. The consequence was that the body was too decomposed to admit of examination, and the stomach, that was secured and sent to Calcutta for examination, failed to give signs of any poison." There is nothing in the depositions of the two witnesses—the only two witnesses who have given evidence in the case—from which I can gather the material portion of this statement of fact. Therefore again, I suppose that they must have said more in Court than the deposition on the record represents. I find also that the Judge says:—"The husband accused his wife of having poisoned him, but she remained silent." Now, the only thing that I find in these two depositions bearing upon this is, first, in the deposition of Mahashan this sentence:—"He" (i.e., the deceased) "said he believed his wife had poisoned him; she was then in the house, but she said nothing;" and, secondly, in the deposition of Halal, who says in one place:—"The deceased believed his wife

had poisoned him." And then afterwards he says :—" His wife was present when Gani accused her, and she made no reply." But I find no statement that Gani did in fact accuse her, or what words he used if he did accuse her.

I am afraid, therefore, that not only was the case meagre in consequence of the fault of the prosecution, but further that the record which has come up to us does not even give the whole of that little which actually was before the Court of Session. However, we must judge the matter by the record as we have it, and it seems to me that that which I have read and referred to falls very far short of constituting a foundation upon which a Court could sufficiently come to the conclusion that the person accused before it has committed murder. There are, however, in addition to this material, two statements deliberately made by the prisoner and taken down in writing at the time ;—one is the statement which she made before the committing Magistrate, and is as follows :—(*reads*). The second statement is that which the prisoner made before the Sessions Court. She was there asked whether the confession before the Magistrate, and which was read in Court, was true. [His Lordship here read the prisoner's answer to the Judge.] It will be observed that, if the first of these statements amounts to a confession of guilt, the second at any rate repudiates it, and gives an entirely different version of the transaction. If the one statement is to be taken against the prisoner, the other ought also to be taken for as much as it is worth in her favor. And then comes the question whether either of these statements is to be believed, and if either of them, which of them in preference to the other, or whether any inference can be drawn from them relative to the prisoner's guilt on the present charge.

All lawyers, who have any experience in criminal practice, well know how dangerous it is to take any prisoner's confession of guilt against himself, even though it appear to have been made voluntarily ; and certainly if this be so in England, as it is, I think I may venture to say it is not less so in this country. At any rate, inasmuch as in this case the only foundation upon which the verdict of guilty can stand at all, is that which is furnished by the words of the prisoner herself, and as the prisoner

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has made two perfectly distinct statements with regard to the matter of the crime with which she is charged, it is especially incumbent upon the Court to weigh well the relative credibility of these two statements before it takes one in preference to the other, and on the footing of it passes that sentence of the law, which, if once carried out, admits of no possible re-call. I am by no means myself prepared to say that if I had been called upon to judge of the facts of this case in the first instance on the materials only which are on the record, I should not have taken the second statement of the prisoner as being probably more near the truth than the first one. I have already given reasons for thinking that the evidence of the two brothers, with regard to the original confession, as it stands on the record, does not disclose, at any rate, all the real facts. It appears to me that the statements of these men on this point ought to have been scrutinized with the greatest care, and the confession made before the Magistrate in accordance with them, received with great suspicion. But, however this may be, I find from documents, which were not produced before the Court of Session (and which I look at because they tell in favor of the accused), materials which go very far indeed, as it seems to me, to render it probable that the prisoner in administering to her husband some ingredient in the rice, may have done so without the intention of poisoning him. There is among the documents which have come up to us a letter from the Civil Surgeon of Dinagepore, in which he states that he had examined the persons of both the prisoner and of Majnoo, and that he found that the prisoner herself was suffering from venereal disease in a severe form, while Majnoo was entirely free from any trace of it. I cannot myself understand why in the interest of justice the evidence of the medical gentleman, who was able to depose to such facts as these, was not taken at the trial in the Sessions Court. It goes to my mind almost conclusively to show that there was no such thing as an intrigue going on between the prisoner and Majnoo; and if so, as there is no suggestion made as to the source from which the prisoner could have contracted her disease, the inference is not very far to reach that it had been inflicted upon her by her husband. Then, I think, when we come so far

as this, we find very good reason for preferring the statement which the prisoner made in Court as to the reasons for her administering something to her husband in the rice, to the confession which she made before the Magistrate. The Judge says that : " Before this Court, the prisoner admits mixing some medicine with her husband's food, but qualifies her confession, so far as to say, she gave it him to cure his venereal disease. If she gave him the medicine for such a purpose, she would not have administered it in a secret way with her husband's food, and without his will and permission." It seems to me that it was rather hard upon the prisoner to say that she " qualified her confession so far," and so on ; when in truth this was no confession at all, but merely a statement, which voided the guilt if it was to be believed. And I do not feel with the same force, as the Sessions Judge seems to have done, the improbability of the wife, under the circumstances which she mentions, administering the medicine in secret, that is to say, secretly as regards her husband. There might, I think, be conceived very many reasons why she should be disposed to make him try a remedy which she believed in, and which she might know he would not himself voluntarily take. We do not at this moment know what was the ingredient, the article actually administered. I suppose that taking the evidence of the two brothers as to the phenomena exhibited by the sufferer after eating the food, any one might reasonably come to the conclusion that the man had died in consequence of something which had acted as an irritant poison to him. But I think it is very unfortunate that, were even the very first step which is to be taken in the case, is a step of this kind, the Court was not aided by the evidence of an expert, namely, of the medical man, who seemingly was accessible, and whose evidence might have been taken. There is not even any proof on the record that the reason why no poison was found was that which was given by the Judge. The whole of that part of the case is left in perfect obscurity as far as the record indicates, and the consequence no doubt is, as the Judge admits, that the Sessions Court had to determine this momentous issue of life and death upon about the most meagre materials that could be well conceived. It

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appears to me that in this state of things it was clearly a just course to pursue that the Court should give the unfortunate prisoner the benefit of the uncertainty, and acquit her.

The case now comes up to us under the provisions of the Criminal Procedure Code for confirmation of the capital sentence, and we therefore have the power of passing that sentence which we think ought to have been passed by the Sessions Court. It seems to me that the prisoner ought to have been acquitted, and I think, therefore, that the sentence and the conviction must be set aside, and the prisoner acquitted.

AINSLIE, J.—I concur in acquitting the prisoner. There is no doubt that shortly before the death of Gani, she administered to him some drug which had the effect of causing his death, but it does not appear that she administered the drug with any guilty intention or knowledge that administering the drug was imminently dangerous. If we are to believe the first confession before the Magistrate, not doubt there was guilty intention ; but the second statement which she made before the Judge, that she administered the drug to cure her husband, is probably the true one. In saying this, I rely on the report of the medical officer who, as has been pointed by my learned brother, should have been examined in this case. The circumstances that he describes are entirely consistent with the second statement made by the prisoner, and I do not think that the evidence of the brothers as to her confession immediately after the death of her husband is to be taken as of any weight. It is not probable that she would administer poison, and then the moment that her intention had been carried out, and her scheme for freeing herself from the husband and enabling herself to carry on the intrigue with Majnoo had become successful, that she would expose the whole matter to the brothers, unless some very cogent means of compulsion were applied to her. They say nothing about the means employed to induce her confession, and it is very probable that they have amplified any admission that was made. As the matter stands I am by no means prepared to accept the statement which was made before the committing officer in the first instance as sufficient to warrant a conviction for murder.

Conviction set aside.

APPELLATE CIVIL.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Ainslie.

**MUSSAMAT DOORGA BIBEE AND ANOTHER (DEFENDANTS) v. JANAKI
PERSHAD (PLAINTIFF).***

1872
Aug. 7.

Hindu Law—Mitakshara—Inheritance—Succession.

A brother's daughter's son succeeds as heir, under the Mitakshara, in the absence of nearer heirs.

THE facts of this case were as follows :—Zorawur Sing had two sons, Rogoonath Sing and Boodnath Sing. Rogoonath Sing had two sons, Bishnath Sing and Sheonath Sing (neither of whom, according to the plaintiff's case, left any legitimate sons) and a daughter by name Sheo Dae. Sheo Dae left a son, the plaintiff. The plaintiff stated that the property of Boodnath Sing, after Boodnath's death, went to his widow Mungla Bibee, who died childless, and that consequently the plaintiff became entitled to the same ; but that one Tulsiram, whose mother was a servant of the family, took wrongful possession of the property and that after his death the property was taken possession of by his widow, the defendant, Doorga Bibee. Hence the plaintiff brought this suit to establish his right to succeed to the property as a brother's daughter's son under the Mitakshara law, and to set aside a certain alienation in favor of one Pireet Coonwar, one of the defendants in the case. Doorga Bibee's defence among other things was that Tulsiram, her late husband, was a legitimate son of Bishnath Sing by a second wife, Mussamat Badamoo, and that therefore he was the rightful heir to Boodnath, being a brother's son. The Subordinate Judge considered that Tulsiram was Bishnath's legitimate son, and dismissed the suit. On appeal the Judge came to an opposite conclusion and passed a decree in favor of the plaintiff.

* Special Appeal, No. 142 of 1872 from a decree of the Officiating Additional Judge of Patna, dated the 30th June 1871, reversing a decree of the Officiating Subordinate Judge of that district, dated the 16th of February 1871.

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The following passage occurred in his judgment :—

"To my mind they (certain documents filed in the case) make it clear that Bishnath Sing sold to Juggernath Pershad and Mungla Bibee some property (that purchased by the latter with others forming the subject of the present suit); that before their names could be entered in the Collector's register, he died; and that, in order to get the mutation of names settled, Rukman Bibee, a wife of Bishnath Sing, appeared and acknowledged the sale-transaction, but not so Tulsiram."

The defendants appealed to the High Court.

Baboo *Kaliprosono Dutt* for the appellants contended that a brother's daughter's son is not entitled under the *Mitakshara* to succeed—*Illias Coonwur v. Agund Rai* (1.) If he was heir under the law, he would not have been omitted from the enumeration of cognates in c. 2, s. 6, art. 1 of the *Mitakshara*. It is not clear from the judgment of the Court below whether the whole of the property was Mungla Bibee's *stridhan* or not. What she purchased was of course her *stridhan*. The portion acquired from her husband also must be considered as her *stridhan*, and must go to such persons as would be entitled to take her *stridhan* under the law; 1 Macnaghten's Hindu Law, pp. 38 and 39.

Mr. R. E. Twidale for the respondent.—The plaintiff is entitled to succeed as a *bandhu* or cognate. *Bandhu* is defined to be one who is sprung from a different family, but connected by funeral oblations; Colebrooke's *Mitakshara*, c. 2, s. 5, art. 3; and by art. 1, s. 6, of the same chapter, cognates are heirs. The plaintiff could offer *pind* to Rogoonath, his maternal grandfather, and to Zorawur, his father, and to Zorawur's father. By offering the cake to Zorawur, he confers benefit on his son Boodnath Sing. This point was fully discussed before the Full Bench in *Amrita Kumari Debi v. Lakhinarayan Chuckerbutty* (2), which was a case of a sister's son. It was laid down in that case, on the authority of Menu, that a sister's son is like a son's son. The case of *Illias Coonwur v. Agund Rai* (1) is not supported by any authority. The omission of the brother's daughter's son from the enumeration of cognates in

(1) 3 Sel. Rep., 37.

(2) 2 B. L. R., F. B., 28.

c. 2, s. 6, art. 1, is not material, because it has been held by the Judicial Committee in *Giridhari Lal Roy v. The Government of Bengal* (1), and by this Court in *Amrita Kumari Debi v. Lakhinarayan Chuckerbutty* (2) that the enumeration there given is not exhaustive. In *Giridhari Lal Roy v. The Government of Bengal* (1), the Judicial Committee notice the case of *Ilías Coomoor v. Agund Rai* (3) and overruled it. Property which has come to a widow from her deceased husband goes to the heirs of the husband after the death of the widow—*Ohowdhry Bholanath Thakoor v. Mussamut Bhagbatti Deyi* (4). There are several cases to show that property acquired by a woman does not on her death go to her heirs—*Gobardhun Nath v. Onoop Roy* (5) and *Punchanund Ojhab v. Lalshan Misser* (6). Property acquired by a woman by inheritance is not to be classed as *stridhan*—*Sengamalathammal v. Valaynda Mudali* (7). It must therefore go to her husband's heirs. But here, the property claimed in the suit was treated throughout as that of the husband, Boodnath Sing.

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Baboo Kaliproseno Dutt in reply.—The contention that, because the sister's son succeeds, therefore a brother's daughter's son must succeed is not correct. A sister's son is a nearer relative and succeeds for the reasons given in *Amrita Kumari Debi v. Lakhinarayan Chuckerbutty* (8). According to that case, a sister's son is a *sapinda*, and such as he succeeded; but a brother's daughter's son is not a *sapindu*. The sister's son was not allowed to succeed merely on the ground that the enumeration of *bandhus* in the Mitakshara is not exhaustive.

The judgment of the Court was delivered by

COUCH, C. J.—Three objections were raised in this special appeal on the part of the appellant; the first was that, on the plaintiff's own showing, there was a nearer heir to Boodnath

(1) 1 B. L. R., P. C., 44,
 (2) 2 B. L. R., F. B., 28
 (3) 3 Sel. Rep., 37.
 (4) 7 B. L. R., 93.

(5) 3 W. R., 105.
 (6) *Id.*, 140,
 (7) 3 Mad. H. C. Rep., 312.
 (8) 2 B. L. R., F. B., 28. See pp. 32, 33
 of the report.

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Sing than the plaintiff, as one of the witnesses had mentioned in his deposition that there was a sister's son, who might be entitled in preference to the plaintiff. But we thought and said during the argument that we could not take this mention of the sister's son as a fact that was found by the Court, and could not act upon it. We are to deal with the case upon the facts found by the lower Appellate Court; that objection therefore could not be allowed to be raised.

Another objection was that the property, which was the subject of the suit, was not the property of Boodnath Sing, but of his widow Mungla and her *stridhan*, and a passage in the judgment was referred to in support of this view. But it is clear, notwithstanding that passage, that the lower Appellate Court, and indeed the parties also in the course of the suit, treated the property in question as that of Boodnath Sing, and the question in the suit being who was entitled to it as heir, it is certainly possible that the circumstance mentioned in the judgment of the purchase of some portion of it by Mungla might have been explained. That objection, therefore, could not be allowed to be taken.

The only question that remained was whether the plaintiff being a brother's daughter's son could inherit the property, and that is settled by the decisions of the Privy Council in the case of *Giridhari Lal Roy v. The Government of Bengal* (1) and of a Full Bench of this Court in *Amrita Kumari Debi v. Lakhin Narayan Chuckerbutty* (2), where it was held that the enumeration of *bandhus* in art. 1, s. 6, c. 2 of the Mitakshara is not to be considered exhaustive. That being so, there is no ground for saying that a brother's daughter's son cannot inherit in the absence of any nearer heir; and as it is not found in this suit that there is a nearer heir, the plaintiff is entitled to a decree.

The appeal must be dismissed with costs.

Appeal dismissed.

(1) 1 B. L. R., P. C., 44.

(2) 2 B. L. R., F. B., 28.

Before Mr. Justice L. S. Jackson and Mr. Justice Mitter.

THE BOMBAY BURMAH TRADING CORPORATION, LIMITED
(DEFENDANTS), *v.* **MIRZA MAHOMED ALI SHEBAGEE (PLAINTIFF).***

1873
Jan. 23.

*Jurisdiction of British Municipal Court—Act of State—Title to Timber—
Confiscation by Governor of foreign State—Measure of Damages.*

The plaintiff brought a suit at Tonghoo in British Burmah to recover possession of certain timber, which he alleged the defendants had, wrongfully and in collusion with the Burmese Governor of Ninghan, taken out of his possession in foreign territory and removed to Tonghoo. The defendants stated that they had acquired the timber from the Governor of Ninghan in terms of an agreement between them and the Burmese Government. It appeared that the Governor of Ninghan had confiscated the plaintiff's timber in contravention of a royal mandate. After the institution of the suit, the defendants removed the timber from Tonghoo to Rangoon. *Held*, that a British Municipal Court might enquire into the character of the act of the Governor of Ninghan, and was not bound to accept it as an act of State.

The Court below having fixed the price of the timber at Rangoon as the alternative damages in case of non-delivery, the High Court refused to interfere with such award.

THIS was a suit brought in the Court of the Assistant Commissioner at Tonghoo for the recovery of 65 logs of teak timber or their value. The plaintiff alleged that the logs were part of a large number felled or purchased by him under and during the continuance of licenses to work the Ninghan forest granted to him by the Burmese Government, and for which he had paid it more than Rs. 24,000. The logs bore his hammer-marks.

On the 15th July 1867, Messrs Darwood and Goldenbergh, acting as agents or trustees for the defendants, obtained from the King of Burmah a lease of, or license to work, the Ninghan forest for four years from October 1867. The lease contained no mention of previous licensees, but it prohibited the export of certain descriptions of timber from the King's territories by any persons other than the defendants. On the 11th November 1867, Darwood and Goldenbergh obtained a supplementary grant which empowered them to buy up timber felled before the time of the commencement of their lease at Rs. 2 less than its mar-

* Regular Appeals, Nos., 67 and 68 of 1872, from the decree of the Recorder of Rangoon, dated 8th January 1873.

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ket-value, provided however that, if they failed to buy it, the owner should be at liberty to sell it as they pleased. On hearing of the defendants' lease, the plaintiff got a royal mandate from the King of Burmah, the effect of which was that the defendants should be at liberty to take the plaintiff's good timber at the rates they had agreed to pay for timber in their contract with the King, and that they should have the option of taking the plaintiff's inferior timber at Rs. 2 less ; but in case they failed so to take it, that the plaintiff should be entitled to sell his timber without let or hindrance. This mandate was forwarded to Ninghan, and there read aloud in the presence of the Woon or Governor, Darwood, and the other persons interested. Immediately after its receipt, the Woon, as the Recorder found, " commenced a series of illegal and oppressive acts towards the plaintiff, to which Darwood was privy, if he did not instigate them, in order to drive the plaintiff away, or compel him to part with his timber for what he could get for it." Ultimately, the Woon confiscated the plaintiff's timber, caused his own marks to be placed upon it, and transferred the property in it to the defendants, who had previously received formal notice of the plaintiff's claim. Thereupon, the plaintiff brought the present suit alleging in his plaint that the defendants had wrongfully and in gross collusion with the Governor of Ninghan taken the timber out of his possession in the foreign jurisdiction, and removed it into British Burmah, and that the timber was then at Tonghoo. After the institution of the suit, the defendants further removed the timber from Tonghoo to Rangoon, and they also succeeded in getting the suit transferred to the Court of the Recorder of Rangoon, notwithstanding that nearly all the witnesses resided at Tonghoo. The defence raised by the defendants was that, under the agreement or license of the 15th July 1867, they alone were entitled to work and bring out timber from the forest of Ninghan ; that the logs in dispute had been purchased by them from the Governor of Ninghan in terms of the said agreement, and that they never had been the property of the plaintiff. They also, during the course of the suit, objected to the jurisdiction of the Court, but the objection was overruled on the authority of the opinion expressed by the High Court in

Saya Loo v. Nga Paw Loo (1). At the trial issues were fixed, of which the first was "whether the plaintiff is entitled to recover from the defendants the 65 logs of timber specified in the plaint or the value thereof."

The Recorder passed a decree in the plaintiff's favor, fixing the alternative damages, in case of non-delivery, at Rs. 50 a log, which was the market rate at Rangoon.

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The defendants appealed to the High Court.

The *Advocate-General*, *offg.* (Mr. Paul) and Mr. Woodroffe for the appellants.

Mr. Evans and Mr. Macrae for the respondent.

The *Advocate-General*.—The first issue is too vague. The plaintiff has not established his title to the timber; the mere fact that the logs bore his marks is not sufficient evidence of title—*Snadden v. Todd, Findlay and Co.* (2). The defendants acquired the timber from the Woon, who had confiscated it in his official capacity; whether or not the confiscation was wrongful is immaterial; it was an act of State, and as such not cognizable by the Municipal Courts of a foreign country; see Forsyth's Cases and Opinions, p. 86—*Buron v. Denman* (3), *The Secretary of State in Council of India v. Kamachee Boye Sahaba* (4), and *The Rajah of Coorg v. The East India Company* (5). The damages have been wrongly estimated. The proper measure of damages was the value of the timber at Tonghoo when the suit was brought, and interest for the time it was detained. If it were otherwise, a person wrongfully dispossessed might lie by until his property had been improved by the labor or at the expense of the wrong-doer, and then claim it at the enhanced value—*Jegon v. Vivian* (6). In any case the plaintiff ought not to have recovered more than the market-value at Rangoon after deducting the expense incurred in removing the timber from Tonghoo.

(1) 6 W. R., Civ. Ref., 4.

(2) 7 W. R., 286.

(3) 2 Exch., 167.

(4) 7 Moo. I. A., 476.

(5) 29 Beav., 300.

(6) 40 L. J. Ch., 389; see p. 395; S. C. L. R., 6 Ch., 742.

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Mr. *Evans* for the respondent.—The evidence shows that the marks on the timber are evidence of ownership. It cannot be contended that every act of a public officer is an act of State. See *The Secretary of State in Council of India v. Kamachee Boye Sahaba* (1), as to what constitutes an act of State. The damages were properly estimated.

Mr. *Macrae* on the same side.—The confiscation of the plaintiff's timber by the Woon was in direct contravention of the royal mandate, and cannot therefore be considered an act of State. With regard to damages, if this action had been brought in England, it would have been in trover, in which the conversion would have formed the gist of the plaintiff's right, but the jury might have taken the nature of the taking into consideration in awarding damages, and the Court would not grant a new trial on the ground that the damages were excessive. In this country the Court is not fettered by technicalities, and can give such damages as it thinks just. If the case had been decided at Tonghoo, the damages would still have been the value of the timber where it was found. The defendant could not claim to be recouped the cost of carriage to Rangoon, that carriage being tortious: see *Selgwick* on damages, p. 564.

The *Advocate-General* in reply.—The Woon's act was an act of State—*Elphinstone v. Bedreechund* (2). If the title of the person who took from the Woon can be attacked in a British Court, then an action would lie against the Woon himself if he happened to come within the jurisdiction, the cause of action having arisen in foreign territories would not bar the suit; see *Saya Loo v. Nga Paw Loo* (3). I contend that a British Municipal Court cannot enquire whether or not the act of a foreign Governor was legally valid, since that would be taking cognizance of an act of State. If the plaintiff's marks on the timber were evidence of his ownership, the Woon's marks must equally be evidence of the Woon's ownership.

(1) 7 Moo. I. A., 476, at p. 501.

(3) 6 W. R., Civ. Ref., 4.

(2) 1 Knapp, 316.

The judgment of the Court was delivered by

JACKSON, J.—I think we can have no doubt as to what our decision ought to be on this appeal.

(His Lordship, after briefly stating the facts and the first issue, continued,)—It is complained by the Advocate-General, and I think not without justice, that this issue was too vague and general in terms, but it has not been shown that the defendants were prejudiced by the vagueness. Each party was represented by Counsel and agents who thoroughly understood what case they had to make; and it does not appear that either party was precluded from adducing any evidence which he thought material to his case. The result was that, upon the evidence the Recorder came to the conclusion that the timber was shown to belong to the plaintiff, and to have been wrongfully and without right taken by the defendants undoubtedly with the aid of the person who at that time held the office of Woon or Governor of Ninghan. Having come to this finding, the Recorder ordered possession of the timber to be delivered to the plaintiff; and in default of delivery of possession, that the plaintiff recover from the defendants Rs. 50 for each log, being the price of teak timber then prevailing at Rangoon.

On appeal before us, the defendants take several grounds, on the first of which the learned Advocate-General contends that the plaintiff has not made out his right to the timber in suit. It appears to me that the evidence on this point is overwhelming in favor of the plaintiff. The plaintiff has made out the license, or rather the grant which he said he obtained from the royal authority in Burmah, and has, I think, shown that the timber to which the suit refers was either cut or purchased by him from other parties during the continuance of that grant.

It is then said that the validity of the plaintiff's title depends upon the proof that he paid to the Burmese Government the amount stipulated in the grant. It seems to me that this is a matter on the proof of which the defendants are not entitled to insist; and that even if they are so entitled, it has been sufficiently proved from the account put in by the plaintiff, as well as by the parol evidence, that he had paid from time to time the amounts stated into the royal treasury, and it certainly does

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not appear from anything shown on the other side that the plaintiff was in any default on that account.

Then it is said that the defendants had in fact good title to this timber, having acquired it from the Governor of Ninghan, who, in turn, had taken it out of the possession of the plaintiff by an act of confiscation, which confiscation is relied on as an act of State such as a British Court is not competent to question. The learned Advocate-General contends that this defence of an act of State being set up on the part of his clients, and it being shown that the person through whom or by whose assistance the defendants had taken possession of the timber was the foreign local authority Governor or Woon, however oppressive, or arbitrary, or unjust the act of the said officer may have been, a Court of British India is not entitled to enquire into the character of that act, and must accept it as an act of State. I cannot however assent to this proposition. It seems to me that, when the defendants set up as justification something which they call an act of State, the Court is bound to see whether the act relied upon is one of that character. Here it is found that, so far from the act of the Governor of Ninghan being ratified by or in conformity with the will of the supreme authority in Burmah, it was in fact in express contravention of the royal mandate, and to my mind it is destitute of all the characteristics which one might expect to find in anything of an act of State. It does not appear that any sentence or official order was issued under which the expoliation, as I must call it, took place. So far from that, it appears that, in order to facilitate the acquisition of the timber by the defendants, the Governor commenced a series of illegal and oppressive acts towards the plaintiff, and to use threats of charges alleged to have been preferred against him by one Abdool Gunny, so as to compel him to leave the Burmese territory.

We are then told that the placing of marks on the timber by the Woon amounted to an act of confiscation. It seems to me, however, that it was not so. If the order of the Governor was not an act of State, and, as I have already said, it was not, no more was the imposing of the mark. I think that the plaintiff has made out his right to the timber, and that the defend-

ants have wholly failed to establish the proposition on which they relied. Further, I may observe, as pointed out by Mitter, J., that the defendants in their written statement never relied on, or referred to, the so-called act of State ; and that if they had done so, no doubt a formal issue would have been framed on that point, and not only the defendants, but also the plaintiff, might have had the opportunity of producing evidence such as each party thought fit to adduce.

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A further question then has been raised as to the amount of damages allowed to the plaintiff in the suit. It has been a matter of complaint that the Court in awarding to the plaintiff alternative damages has given him the gross value of timber then prevailing at Rangoon without taking into consideration, and making any deduction on account of, the charges incurred by the defendants in removing the timber to that place. The learned Advocate-General has invited us to lay down on this subject some general rule as to the principle on which such damages should be assessed. In the present case I think it quite unnecessary that we should accept any such responsibility. The duty which the Court had to perform under s. 191 of the Civil Procedure Code is clear. "When the suit is for moveable property, if the decree be for the delivery of such property, it shall also state the amount of money to be paid as an alternative, if delivery cannot be had." Now, in a case like the present, the money to be paid as an alternative was manifestly the value of the timber if that could be clearly ascertained. At the time of the bringing of the suit, the timber was at Tonghoo. It is stated, and no doubt truly, that the value of the timber at Tonghoo is considerably less than the value of the same at Rangoon. The carrying of the timber from Tonghoo to Rangoon by the defendants after the suit had been commenced, and after the defendants therefore had full notice that the plaintiff had taken steps to recover his property, was entirely at their own risk. If the law had not provided, as it does in s. 191, that the Court should state the amount of money to be paid as an alternative, the decree, no doubt, should have directed delivery of the specific property decreed to the plaintiff. Can it be said in that case that the Court ought to have ordered that, before delivery

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of the thing to the plaintiff, the plaintiff do reimburse the defendants the charges of bringing the timber to Rangoon? I think not. It must also be borne in mind that the difference between the value of timber at Tonghoo and at Rangoon is not simply made up of the charges incurred in the transport of it, but depends in a large degree upon the wider market at Rangoon and the facility of sale. The defendants having, as is shown above, at their own risk removed the timber from Tonghoo to the place where the suit was afterwards tried, I think the plaintiff is entitled to insist upon the delivery of it to him, and in default of delivery to recover the value of it; and although I quite assent to the proposition of the learned Advocate-General that it is not the business of the Civil Court to inflict punishment on defendants, taking motives into consideration, I must say that we have had sufficient experience of timber suits from Rangoon, and in particular enough is disclosed in the facts of the present case, to make it no matter of regret that the defendants should be made liable to pay heavy damages.

I think therefore that this appeal must be dismissed with costs.

Appeal dismissed.

Before Mr. Justice Glover and Mr. Justice Mitter.

BISTOO CHUNDER BANERJEE (PLAINTIFF) v. NITHORE MONEE
DABEE AND ANOTHER (DEFENDANTS).*

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January 24.

Suit for Contribution—Interest—Act XXXII of 1839 (1).

In suits for contribution it is in the discretion of the Court to allow or refuse interest on the amount claimed, whether there has been a written demand for it or not.

(1) "Upon all debts or sums certain payable at a certain time or otherwise, the Court before which such debts or sums may be recovered, may, if it shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debt or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debt or that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law."

* Special Appeal, No. 615 of 1872, from a decree of the Subordinate Judge of East Burdwan, dated the 30th November 1871, affirming the decree of the Munsif of that district, dated the 15th December 1870.

On Mohamayah Dabee obtained a decree against Rakhal Doss Mookerjee, Bhuggobutty Churn Chatterjee, and Nobotarinee Dabee. Rakhal Doss Mookerjee paid the whole amount of the decree, and sold his right of action to recover the two-thirds thereof from Bhuggobutty Churn and Nobotarinee to Bistoo Chunder Banerjee. Bhuggobutty Churn died, leaving a daughter named Nithore Monee. This suit was instituted by Bistoo Chunder against Nithore Monee and Nobotarinee for recovery of the two-thirds of the amount paid in satisfaction of the decree obtained by Mohamayah, with interest thereon from the date of payment.

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The defendants contended that the plaintiff was not entitled to the interest claimed by him.

The Munsif held that, as no notice had been given under Act XXXII of 1839, and as the plaintiff had allowed a period of five years to elapse before the institution of the suit, he was not entitled to recover interest from the defendants. He accordingly passed a decree in favor of the plaintiff for the amount of the principal only.

On appeal the Subordinate Judge confirmed the decree of the lower Court.

The plaintiff appealed to the High Court.

Baboo Umbika Churn Banerjee for the appellant contended that, in a suit for contribution, no written demand for interest was necessary under Act XXXII of 1839, and that the plaintiff was entitled to interest—*Golam Ahmed Shah v. Behary Loll* (1) and *Lulleet Biswas v. Prosonomoyee Dossee* (2). The

(1) Marsh. Rep., 239.

Baboo Umbika Churn Banerjee for the

(2) Before Mr. Justice L. S. Jackson and

respondent.

Mr. Justice Glover.

LULLEET BISWAS (ONE OF THE DEFENDANTS) v. PROSONOMOYEE DOSSEE (PLAINTIFF) & ANOTHER (DEFENDANT).*

The judgment of the Court was delivered by

The 1st February 1872.

Suit for Contribution—Interest.

Baboo Bungeesee Dhur Seim for the appellant.

JACKSON, J.—This was a suit for contribution. Two objections were raised in special appeal; the one being that interest has been allowed, although no demand had been made; the second is

* Special Appeal No. 1057 of 1871, from a decree of the Additional Judge of Jessore, dated the 20th May 1871, reversing a decree of the Sudder Munsif of that district, dated the 28th June 1870.

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mere fact of there being delay in the institution of the suit is not sufficient to disentitle the plaintiff to recover interest.

Baboo Grish Chunder Mookerjee for the respondent was not called upon.

The judgment of the Court was delivered by.

GLOVER, J.—The plaintiff in this suit was the purchaser of a right of action in a contribution suit against certain parties. He brought the suit and was successful in getting a decree against the defendants for certain sums to be paid by them severally. The present special appeal is preferred on the subject of interest. The Subordinate Judge refused interest on two grounds : first, because by Act XXXII of 1839 no interest could be allowed, inasmuch as no written demand had been served on the debtor ; and, secondly, because the decree-holder had allowed five years to elapse before making this demand for interest.

The first reason given by the Subordinate Judge is no doubt wrong, Act XXXII of 1839 not applying to contribution suits. This point has been ruled in the case of *Golam Ahmed Shah v. Behary Loll* (1) and in the case of *Indest Biswas v. Prosonomoyee Dosses* (2) But the Judge has given another

that the separate liabilities of the defendants have not been set out in the decree. On the first point, the respondent adduces as authority the case of *Golam Ahmed Shah v. Behary Loll* (a), which shows that it is usual to allow interest in such cases, because such interest was accustomed to be given by the common law before the passing of the interest law.

As to the extent of the shares, the respondent has no objection to the modification of the decree of the Court below in that particular. The defendant's liability, therefore, will be according to the shares stated, that is to say, the pre-

sent special appellant and the joint owners with him of the six annas share, will be declared liable for their six annas, and the other defendant for his four annas share.

This is an alteration of the decree which might well have been made by the lower Appellate Court on application to it for that purpose, and, therefore, I think the respondent should get his costs of this Court.

GLOVER, J.—I concur.

(1) Marsh. Rep., 239.

(2) *Ante*, p. 353.

(a) Marsh. Rep., 239

reason which we consider a reasonable one, namely, that the decree-holder slept over his rights for no less than five years before making his demand for contribution, and we do not see any error in law which would justify our interfering with his order. There was no contract between the parties to pay interest, and there is no rule of law by which, in the absence of such contract, an award of interest is made compulsory. It was within the discretion of the Court below either to give or to withhold interest, and there is no ground for our interfering with his order.

The special appeal is dismissed with costs.

Appeal dismissed.

ORIGINAL CIVIL.

Before Sir Richard O'uch, Kt., Chief Justice, and Mr. Justice Pontifex

PURSON CHUND GOLACHA (PLAINTIFF) *v.* KAJOORAM AND
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Second New Trial—Small Cause Court.

It is competent to the Judge of the Calcutta Small Cause Court to grant a second new trial of the same case.

THE defendant having obtained judgment in his favor in a suit in the Small Cause Court, the plaintiff obtained a new trial. Judgment was again given in favor of the defendant. The plaintiff again obtained a rule absolute for a new trial, but subject to the opinion of the High Court on the question "Whether it is competent to the Judges of this (the Small Cause) Court to grant a second new trial on the same case."

Mr. Woodroffe and Mr. Phillips for the plaintiff.

Mr. Jackson for the defendants.

Mr. Phillips.—The plaintiff has obtained a rule absolute for a new trial. Under these circumstances I do not know who ought to begin.

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COUCH, C.J.—The rule was made absolute subject to the opinion of this Court, the case therefore comes before us, as though you were now moving for a rule, therefore you ought to begin.

Mr. Phillips.—By Act IX of 1850, s. 53(1), the Judges of the Small Cause Court, “in every case whatever, have the power “if they shall think fit, to order a new trial to be had.” Unless “a new trial” is to be taken as equivalent to “one new trial,” there is nothing to restrict the power. A new trial is in every respect a distinct proceeding, new evidence is given, new points of law may possibly arise, and there is a new judgment. There appear to be no authorities as to the practice in this respect of the English County Courts, but the superior Courts undoubtedly have the power to grant a third trial—Chitty’s Archbold’s Practice, 1534.

Mr. Jackson.—The Small Cause Court is an inferior Court, and, therefore, cannot grant a new trial, except for irregularity or fraud, unless it have an express statutory power—*The King v. The Mayor of Oxford* (2); per Maule, J., in *Mossop v. The Great Northern Railway* (3); and *The Great Northern Railway v. Mossop* (4). S. 53 of Act IX of 1850 is in the same terms as s. 89 of the County Courts’ Act 9 & 10 Vict., c. 95. [PONTIFEX, J.—The case of *Mossop v. The Great Northern Railway* (3) only shows that the County Court cannot entertain repeated motions for a new trial.] The case shows the general principle that the inferior Courts cannot grant new trials. A new trial in England would be had before different juries, whereas here the case would be tried over and over again by the

(1) Act IX of 1850 s. 53.—“Every order and judgment of any Court holden under this Act, except as herein provided, shall be final and conclusive between the parties; but the Judges shall have power to non-suit the plaintiff in every case in which satisfactory proof shall not be given to them, entitling either the plaintiff or defendant to the judgment of the Court; and shall also, in every case whatever, have the power, if they shall think fit, to order a new trial to be had, upon such terms as they shall think reasonable, and in the meantime to stay the proceedings.”

(2) 3 N. S. M., 377.

(3) 16 C. N., 160, as p. 154.

(4) 17 Id., 130.

same Judges. The words in s. 53 must be taken in their ordinary sense. Had the Legislature intended to give a power of granting successive new trials in the same case, it would have used the words "new trials." Under the Rules of Practice of the Calcutta Small Cause Court, the position of the defendant is different after the first and second trials: the defendants' deposit must be left in Court for four days—Rule 56 (1); but if on the new trial the verdict be entered for the plaintiff, the judgment may, by Rule 58 (2), be satisfied at once out of the sum deposited, and the defendant, if he desire a second new trial, must make a fresh deposit. [Couch, C.J.—That only shows that the rules did not contemplate a second new trial, but it will not alter the power if it be given by the Act.] It shows the practice: there is no reported case in which a second new trial has been moved for. If a party may obtain successive new trials in the same case, he can saddle his opponent with enormous costs, for the Judges of the Small Cause Court have repeatedly held that they can only give one set of fees in each case to attorneys and Counsel engaged. [Couch, C.J.—They can give a new set of fees on each new trial. Pontifex, J.—The Judges can put the parties on terms.] If this Court holds that the Small Cause Court can grant a second new trial, it will be conferring a jurisdiction which the Act does not in express words confer.

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Mr. Phillips in reply.

The opinion of the Court was delivered by

Couch, C. J.—The question which has been referred to us by the Small Cause Court is (*reads*). It appears that the Judges

(1) Rule 56.—If the Court is of opinion that a new trial should be granted, the plaintiff shall proceed to set his case down for re-hearing within four days, unless some other time be granted by the Court, and in default, the defendant shall be at liberty to withdraw his deposit.

the plaintiff, the judgment may be satisfied *pro tanto* out of the sum already deposited for debt and costs by defendant, with right of execution against the goods or person of the defendant for the amount payable by the defendant over and above the sum so deposited by him in Court.

(2) Rule 58.—If, on the hearing of the second trial, the verdict is entered for

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of the Small Cause Court had determined to grant a new trial subject to the opinion of this Court ; and we may therefore take it that they considered the case was a proper one for a new trial. The language of s. 53 of Act IX of 1830 is certainly sufficiently large to allow a new trial being granted after a previous new trial (*reads*).

It is reasonable and is in accordance with the practice of the Court in England to grant a new trial after a previous new trial, if it seems necessary for the ends of justice. There are instances in England in the common Law Courts and in the Courts of Equity where more than one new trial has been granted, it appearing proper that it should be done. We think the same rule may be applied here. We must assume that the Judges of the Small Cause Court will not exercise this power unless it appears to them to be right to do so, and they have power to impose such terms as they may think reasonable. We think the question which has been referred to us must be answered in the affirmative, that it is competent to the Judges of the Small Cause Court to grant a second new trial in the same case.

Each party will pay his own costs of stating the case and taking the opinion of this Court.

Attorney for the plaintiff : Mr. *Carapiet*.

Attorney for the defendants : Mr. *Hart*.

Before Sir Richard Couch, Kt. Chief Justice, and Mr. Justice Pontifex.

NOBOOOOMAR DOSS (DEFENDANT) v. KEWATA MUG (PLAINTIFF).

1873

Feb. 28.

Costs—Action on Contract—Verdict for less than Rs. 1,000—Certificate under Act XXVI of 1864, s. 9.

Where in an action in the High Court founded on contract, a verdict was found for the plaintiff for a sum less than Rs. 1,000, and the Judge who tried the case awarded costs without certifying under s. 9 of Act XXVI 1864 that the action was fit to be brought in the High Court, held that the Court might supply the omission on appeal.

APPEAL from a decree of Macpherson, J., dated the 20th August 1872.

The plaintiff sought to recover the sum of Rs. 1,811-6-5 for tobacco sold by him to the defendant on 29th August 1871, giving credit to the defendant for Rs. 200, which the plaintiff said was paid to him on that day. The defendant admitted the transaction, but said that he paid the plaintiff Rs. 1,025, and not Rs. 200 as stated by the plaintiff. He also claimed a balance of Rs. 711-15, as still due to him on account of a former transaction between them. He further said that upon an adjustment of account, the plaintiff allowed him Rs. 225, leaving a balance of Rs. 50, which he admitted to be due to the plaintiff. Macpherson, J., found that the defendant had paid the plaintiff Rs. 1,025, and not Rs. 200; but he gave the plaintiff a decree for Rs. 711-15, and for Rs. 225, with costs on scale No. 2. The defendant appealed.

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Mr. Lowe and Mr. Bonnerjee, for the appellant, contended that the amount which was held to be due to the plaintiff being less than a thousand rupees, the plaintiff was not entitled to his costs, as the suit ought to have been brought in the Small Cause Court; and that the lower Court was wrong in awarding costs to the plaintiff without certifying that it was a fit case to be brought in the High Court as required by s. 9 of Act XXVI of 1864.

Mr. Phillips and Mr. Gregory, for the respondent, contended that the Act did not prescribe any particular form in which a Judge was to certify that a case was a fit case for awarding costs, and that the awarding of costs merely had the same effect as if there was a certificate. They also contended that if it were necessary that there should be a formal certificate or order in accordance with the Act, the Appellate Court could supply the omission by certifying that it was a fit case for awarding costs.

The judgment of the Court was delivered by

COUCH, C.J. (who, after affirming the decree upon the findings of fact, continued)—An objection was taken that the decree being for a sum less than Rs. 1,000, the award of

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costs was erroneous, because there was no certificate under s. 9, Act XXVI of 1864. Now a certificate under that section may, according to the words of it, be given at any time. The words do not require that it should be given immediately. It says that costs shall not be allowed unless the Judge gives a certificate. The case, then, is that the learned Judge has made a decree for costs in express terms; he says "there will be a decree accordingly with costs on scale 2;" but he has omitted to determine the question whether "by reason of the difficulty, novelty or general importance of the case, the action was fit to be brought in the High Court." We think that is an omission which, the case having come before us in appeal, we are at liberty to supply; and if we consider that the action was fit to be brought in this Court, we may, acting as an Appellate Court, supply what has been omitted. We may determine any question which it was essential to determine, and may certify that it was a proper action to be brought in the High Court. We have no hesitation in doing that because we have ascertained from the learned Judge that, if his attention had been called to the necessity of a certificate, he would have granted it.

The appeal must be dismissed with costs on scale No. 2.

Appeal dismissed.

Attorneys for the appellant: Messrs. *Swinhoe, Law and Co.*

Attorney for the respondent: Mr. *Carapiet.*

APPELLATE CIVIL.

Before Mr. Justice Phear and Mr. Justice Ainslie.

MUSSUMMAT BIBEE LUTEEFUN AND ANOTHER (JUDGMENT-DEBTORS)
v. RAJHOOP SINGH (DECREE-HOLDER).*

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Feby. 21.

Limitation—Act XIV of 1859, s. 20—Proceeding to enforce Decree—Application for Review.

An application by a decree-holder for a review of judgment is not a proceeding to enforce his decree within s. 20 of Act XIV of 1859 (1).

In this case, the plaintiff obtained a decree on special appeal in the High Court in 1862, which affirmed the decrees of the lower Courts under which the plaintiff had been declared entitled to a portion only of certain property claimed by him in the suit. The plaintiff made various applications for a review of the judgment of the High Court, all which applications failed, and, in June 1871, he applied in the Munsif's Court to execute the decree of 1862. The Munsif dismissed the application on the ground that it was barred by the law of limitation, but his order was reversed by the Subordinate Judge, and the defendants thereupon appealed to the High Court.

Moonshee Mahomed Yousuf for the appellants.

Baboos Romesh Chunder Mitter and *Nilmadhub Sein* for the respondent.

Moonshee Mahomed Yousuf, for the appellants, contended that the applications for review were not proceedings to enforce the decree.

* Miscellaneous Special Appeal, No. 316 of 1872, from an order of the Judge of Patna, dated the 31st May, 1872, reversing an order of the Subordinate Judge of that district, dated the 19th December 1871.

(1) See Act IX of 1871, Sch. I, No. 167.

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Baboo Nilmadhub Sein for the respondent.—The applications for review were *bonâ fide*—*Bipro Doss Gossain v. Chunder Seekur Bhattacharjee* (1). [AINSLIE, J.—There the application for review was by the judgment-debtor. PHAR, J.—In this case the decree-holder was trying to get a new decree. Is such an endeavour a proceeding to keep the original decree in force?] Where a plaintiff appeals from a decree granting him only a portion of the relief asked for, and the High Court more than three years after the original decree dismisses the appeal, the period of limitation would run from the order of dismissal. [PHAR, J.—In that case it would probably be held that the final decree affirmed such portion of the original decree as was in the plaintiff's favor.]

The following authorities were also referred to by the respondent's pleader:—Thomson on Limitation 317, *et seq*; and *Shaikh Fuzl Immam v. Dootun Singh* (2).

The judgment of the Court was delivered by

PHAR, J. (who, after shortly stating the facts, continued).—The question now is whether the application for execution made in June 1871 is or is not barred by the operation of s. 20, Act XIV of 1859. The words of that section are:—“No process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree, or order of such Court, unless some proceeding shall have been taken to enforce such judgment, decree, or order, or to keep the same in force within three years next preceeding the application for such execution.”

Now it seems to me impossible to construe the various applications for review, which were made to this Court, as proceedings to enforce the judgment of 1862, or any of the preceeding judgments, or in the alternative, to keep the same in force. The object of those applications was distinctly to alter the judgment which had been obtained, and to procure a new judgment or decree to be passed. It appears to me that we cannot, in

(1) Case No. 593 of 1866, 31st May 1867. (2) 5 W. R., Mis., 6.

common sense, say that an endeavour to obtain a new and a more favorable judgment is a proceeding taken to enforce or to keep alive the judgment which it is thus desired to supersede.

The Full Bench decision in *Bipro Doss Gossain v. Chunder Seekur Bhattacharjee*(1) has been appealed to by the respondent. But I see nothing in that decision which tends in any way to support the respondent's case. There the Full Bench decided that appearance by a decree-holder at the hearing of the application for review in order to oppose that application, and to sustain the decree which he had got, was a proceeding taken for the purpose of keeping his decree in force. It seems to me plain enough that it was so. In this instance it is the decree-holder himself, who is making the application for review, and was using his best endeavours to get the original decree set aside, and a new one made. I may add that one, at any rate, of the applications for review was rejected so far back as 1866; and in the application which was made subsequently to that date, no sort of attempt appears to have been made by the applicant to show good cause for being out of time. That fact alone would go very far in my opinion to show that these various applications were not *bona fide* proceedings on the part of the applicant. But however this may be, for the reasons I have already given, I think that the view which was taken by the Munsif in this case was correct, and that the Judge was wrong in considering that the applications for review ought to be treated as proceedings falling under s. 20 taken for the purpose of keeping the decree alive.

I think the execution of the decree is barred by lapse of time. The order of the Judge for issuing execution must be reversed with costs.

Appeal allowed.

(1) Case No. 583 of 1866; 31st May 1867.

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Before Mr. Justice Phear and Mr. Justice Ainslie.

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13, & 18.

THE COURT OF WARDS, ON BEHALF OF KASHOPERSHAUD SING
LUNATIC (DEPENDANT) v. KUPULMUN SING AND ANOTHER PLAINT-
IFFS).*

*Act XXXV of 1858—Lunatic—Guardian—Mortgage by de facto Guardian—
Necessity—Regulations X of 1793, V of 1799, I of 1800, XVII of 1805,
and XVII of 1806, s. 8—Notice of Foreclosure.*

See also
15 B L R 352

A Hindd being a lunatic, may be possessed of property, although he cannot take it by inheritance. All dealings with such property to be binding must be effected by a guardian or manager duly appointed by the supreme civil authority; and since the passing of Act XXXV of 1858, a guardian or manager can only be appointed in the special manner prescribed by that Act. A *de facto* manager can have no greater powers than one duly appointed. Where, therefore, the mother of a lunatic, who had not been so appointed, mortgaged his estate without the previous sanction of the Court, the mortgagee's suit for foreclosure was dismissed.

In this suit Kupulmun Sing and Ramdutt Sing, co-plaintiffs, sued the Court of Wards, as guardian of one Kashopershaud Sing, an idiot, the part owner of a certain mehal, to foreclose a mortgage of the idiot's share of the mehal, and to obtain possession of the mortgage premises.

The plaint alleged that, after the death of the idiot's father, date unmentioned, Mussumat Lukhee Kowar, the mother and guardian of the idiot, was appointed manager and administrator of his estate; that the father in his lifetime had borrowed money, and that the loan effected by him at usurious interest had swelled up to a very large sum; that the estate of the idiot, in execution of a decree of Court for ancestral debt, was advertized for sale; that inasmuch as the complicated and heavy debt at a usurious rate of interest rendered its liquidation fraught with difficulty and danger of the loss of the whole property, the Mussumat, with the view to preserve the ancestral estate of the idiot, through an agent, formally executed, in February 1860, a deed of *bybihoafa*, upon which the plaintiffs' claim was based, for a consideration of Rs. 26,000, at a monthly interest of 7 annas 9 pie *plus* a fraction per cent., stipulating

* Regular Appeal, No. 169 of 1871, from a decree of the Subordinate Judge of Shahabad, dated the 5th May 1871.

that the whole consideration should be repaid at the end of Jeyt 1276 (June 1869). The plaint further alleged that the consideration-money was duly applied to the relief of the estate, and that the plaintiffs regularly realized all the interest thereon up to the end of Jeyt 1276 (June 1869) by the receipt of rent from certain lessees of the estate, but that the Mussumat, notwithstanding the plaintiffs' importunities, refused to pay the mortgage-money at the stipulated period, *viz.*, the end of Jeyt 1276 (June 1869), and that the plaintiffs, therefore, filed an application to the Judge's Court for foreclosure, and got the notice formally issued, and duly served upon the mother of the idiot. The plaint then alleged that the property of the idiot had been placed by an order of the Judge under the management of the Court of Wards, but nevertheless the money had been deposited; and inasmuch as the period of time prescribed by the law had elapsed, the plaintiffs brought this suit for foreclosure (1).

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The written statement by the Court of Wards, as guardian of the idiot Kashopershaud, stated that Mussumat Lukhee Kowar never was the *bonà fide* guardian of the idiot, and never had authority in law to execute the *bybilwafa* on which the plaintiffs relied; that she had in fact applied to the Court for a certificate of guardianship, but her application was rejected on the 8th February 1860, just before she executed the deed of *bybilwafa*. The Court of Wards, in the same written statement, farther denied that, at the time of the execution of the deed, there was any such legal and ancestral debt as would be sufficient in law to support the deed; and also denied that the consideration-money for the *bybilwafa* was applied as the plaint alleged. Further, the Court of Wards alleged that the plaintiffs procured the execution of the *bybilwafa* by the exercise of undue influence, fraud, and collusion, and that the value of the property pledged was greatly more than the alleged consideration for the mortgage.

Upon these statements on the one side and on the other, three issues were raised, namely :—

“ *First.*—Whether Mussumat Lukhee Kowar, mother of

(1) The suit was entitled “claim to foreclosure of mortgage and possession, &c.”

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Kashopershaud (the lunatic), was, on the date of the admitted deed of *bybilwafa*, the guardian of the said lunatic under Hindu law and Government enactment, and as such legal y authorized to contract a loan, and mortgage the lunatic's property, in order to liquidate ancestral debt s of the lunatic, and to save the estate from ruin.

"*Second.*—Whether the said guardian, Mussumat Lukhee, did actually liquidate the ancestral debt of Kashopershaud (the lunatic) with the Rs. 26,000 contracted on this deed or not, i.e., whether her action in contracting the loan and executing the said deed was for legal necessity and justifiable or not.

"*Third.*—Whether the defendant's alleged difference in the amount of the loan contracted, and the amount of the value of the property mortgaged, would make any difference in the nature of this case."

It appeared from the evidence that Lukhee Kowar had never been appointed manager under Act XXXV of 1858. The proceedings in certain suits brought by her for arrears of rent, and which had either been compromised, or in which she had obtained *ex parte* decrees, and certain documents in which she was styled manager by strangers, or was alleged to have so styled herself, were filed by the plaintiffs. There was no evidence to show when Kashopershaud became insane, or who were the other members of his family, and the evidence as to the liability of the estate consisted chiefly of copies of decrees against the idiot's father and of securities executed by him. Of the latter, [many had not been filed, and were not shown to the witnesses called to speak to the debts secured thereby, and to payment of such debts out of the money lent by the plaintiffs.

The Subordinate Judge held that Kashopershaud being a lunatic could not inherit, that Lukhee Kowar was sole heir to her husband, and could not raise any objection to the validity of the mortgage, which, he considered, had been entered into by her in her proprietary, and not in a fiduciary, character. He also found that the transaction was for the benefit of the estate. He passed a decree in favor of the plaintiffs.

The Court of Wards appealed to the High Court.

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Mr. Woodroffe (with him Baboo Unnoda Persad Banerjee) for the appellants.

Baboos Mohesh Chunder Chowdhry, Romesh Chunder Mitter, and Abinash Chunder Banerjee for the respondents.

Mr. Woodroffe, for the appellants.—In order that a person should be *de jure* manager of a lunatic's estate, he must be duly appointed under Act XXXV of 1858. Lukhee Kowar never was so appointed. As manager *de facto*, she would have had no greater powers than a manager *de jure* has, and, therefore, by s. 14 of the Act, she could not mortgage without an order of Court. But there is no evidence on the record to show that she was even *de facto* manager with the exception of certain documents, in which she is styled manager by third persons, or is said to have so styled herself.

Assuming that there was a valid mortgage, there has been no proper notice of foreclosure under Regulation XVII, s. 8, which provides that the notice shall be served on the mortgagor or his "legal representative." The guardian of a lunatic's person is not necessarily his legal representative—*Kishen Bullubh Muhta v. Belasoo Commur* (1). Moreover, the evidence does not show that there was any service on Lukhee Kowar as guardian. The words "legal representative" are very strictly construed by the Court; Macpherson on Mortgages, p. 177. Service on a person believed to be the legal representative is not sufficient—*Id.*, 181, citing *Cheydee Lall v. Mussumat Choonya* (2). In *Ras Muni Dipiah v. Pran Kishen Das* (3), the mother was guardian *de facto* and *de jure*.

The plaintiffs' mortgage-deed disclosed the existence of a *cestui qui trust*; see *Pilcher v. Rawlins* (4). The learned Counsel commented on the evidence as failing to support the plea of necessity and referred to the following cases—*Tiluck*

(1) 3 W. R., 230.

(3) 4 Moore's I. A., 392.

(2) 6 S. D. A., N. W., 278.

(4) L. R., 7 Ch. App., 259.

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Roy v. Phoolman Roy (1) and *Mussumat Bukshan v. Mussumat Maldai Kooeri* (2).

Baboo Mohesh Chunder Chowdhry for the respondents.—Lukhee Kowar was the natural guardian of her lunatic son, and as such the manager of his estate. The evidence shows that she was in several instances sued as manager, and that she herself had successfully brought suits for rent in that capacity. At the date of this mortgage, she was the *de facto* manager of the estate, and the absence of a *de jure* title will not invalidate the transaction—*Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree* (3), *Lalla Boodhmul v. Lalla Gowree Sunkur* (4), and *Gunga Pershad v. Phool Singh* (5). Act XXXV

(1) 7 W. R., 450.

(2) 3 B. L. R., A. C., 423

(3) 6 Moore's I. A., 393.

(4) 4 W. R., 71.

(5) Before Mr. Justice Bayley and Mr.

Justice Macpherson.

GUNGA PERSHAD AND OTHERS (DEFENDANTS) v. PHOOL SINGH AND OTHERS (PLAINTIFFS).*

The 3rd July 1863.

Alienation by de facto Guardian--Necessity

Baboo Ananda Prosad Banerjee, Chunder Madhab Ghose, Khetter Nauth Bose Nilmadub Sen, and Roop Nath Banerjee for the appellants.

Baboo Onoocool Chunder Mookerjee and Kally Mohun Doss for the respondents

The judgment of the Court was delivered by

MACPHERSON, J.—These two appeals, Nos. 3227 and 3252, are from one judgment. The suit is brought to recover possession of certain property under a kabala dated May 1861, which was executed by the defendant, Duryao Lall for himself and as guardian of his minor brothers, the defendants, Gunga

Persaud, Hnr Persaud, and Chooa Lall. Duryao Lall's defence is that he did not execute the bill of sale at all. The defence of his brothers is, 1stly, that Duryao Lall never executed the deed of sale; and, 2ndly, that if he did execute it, his act is not binding upon them. The appeal 3252 is by Duryao Lall, who, both the lower Courts having found against him as to the fact of his having sold the property to the plaintiff, contends that the judgment of the lower Appellate Court is insufficient, inasmuch as it does not show that the Principal Sudder Ameen took into consideration all the evidence adduced by the defendant. There is nothing whatever in this objection, for there is nothing to lead me to suppose that the evidence upon this issue has not been fully considered by the lower Appellate Court. The appellants, Gunga Persaud, Her Persaud, and Chooa Lall, contend that, even if the kabala was executed by Duryao Lall as their guardian, it is not binding upon them for two reasons: 1stly, because he was not their legal guardian, their father being alive at the time of the execution of the deed; 2ndly because there was no such necessity for the sale as makes it binding upon them.

*Special Appeals, Nos. 3227 and 3252 of 1861, from the decrees of the Principal Sudder Ameen of C. y. a, dated the 6th September 1867, affirming the decrees of the Zunsif of that district dated the 23rd May 1867.

of 1858 does not wholly repeal the old law relating to the property of lunatics. Regulation X of 1793, the first enact-

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As regards the objection of Duryao Lall's not being his brother's guardian, the first objection which I have to make is that this plea was not raised in the Court of first instance; and that, although it was mentioned in the written grounds of appeal filed in Court of the Principal Sudder Ameen, no issue was fixed raising the question. The objection taken to Duryao Lall's being their guardian, in the Court of first instance, was based only upon the ground that he had not obtained a certificate. If the defendants wished the lower Appellate Court to decide the question whether Duryao Lall was or was not their guardian, when their father was alive, it was their business to have seen that that issue was distinctly raised, and to have taken steps to ensure its being raised if the Principal Sudder Ameen did not raise it himself. As matters stand, there is nothing to lead us to suppose that the Principal Sudder Ameen's attention was ever drawn to the fact that their father, and not Duryao Lall, was alleged to have been their guardian at the time when the sale was made. But supposing that the father was alive at that time, it appears to us that, if Duryao Lall was *de facto* acting in the matter as the guardian of his brothers, the plaintiff's title would not be bad so far as this objection is concerned.

In *Hunoomanpersaud Panday v. Mussumat Babooes Munraj Koonweres* (a) their Lordships of the Privy Council expressed their opinion that a sale made by a *de facto* guardian under pressing necessity would be good. Their Lordships say:—"Under the Hindu law, the right of a *bonâ fide* incumbrancer who has taken from a *de facto* manager a charge on lands created honestly, for the purpose of saving the estate, or for the benefit of the estate, is not (provided the circumstances would support

the charge had it emanated from a *de facto* and *de jure* manager) affected by the want of union of the *de facto* with the *de jure* title." In the present instance the Principal Sudder Ameen finds as a fact that Duryao Lall for himself, and as guardian of his minor brothers executed the kabala, and that the consideration-money was fully paid, and it is clear from the judgment of the Principal Sudder Ameen that Duryao Lall was in this matter acting as *de facto* guardian of his minor brothers.

There remains the question whether any sufficient necessity for the sale has been proved. As regards this point, their Lordships of the Privy Council observe in *Hunoomanpersaud Panday v. Mussumat Babooes Munraj Koonweres* (b) that "where the charge is one that a prudent owner would make, in order to benefit the estate, the *bonâ fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, is the thing to be regarded. But, of course, if that danger arises, or has arisen from any misconduct to which the lender is, or has been, a party, he cannot take advantage of his own wrong, to support a charge in his own favor, against the heir, grounded on a necessity which his wrong has helped to cause. Therefore, the lender, unless he is shown to have acted *malâ fide*, will not be affected, though it be shown that, with better management, the estate might have been kept free from debt." In the present case, the lower Appellate Court says:—"In this case the guardian, in order to save an entire property which was in danger of being ruined, sold a portion thereof, and thus saved the entire property, that is to say, he saved it by selling a part of it, and applying its purchase-money to the ex-

(a) 6 Moore's I. A., 393, at p. 412.

(b) *Id.*, p. 423.

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ment on the subject, dealt with disqualified proprietors, however the disqualification might arise, but it only applied to proprietors of entire estates paying revenue immediately to Government. Regulation V of 1799 was the first law relating to proprietors of estates like this. That has been repealed as to minors by Act XL of 1858, but it is still in force with respect to idiots and lunatics. By s. 3, when the heir of a person dying intestate is incompetent, and not under the superintendence of the Court of Wards, "his guardian or nearest of kin, who, by special appointment, or by the law and usage of the country, may be authorized to act for him, is not required to apply to the Courts of Justice for permission to take possession of the estate of the deceased as far as the same can be done without violence and the Courts of Justice are restricted from interference in such cases." Regulation I of 1800 provides for the appointment, in certain cases, of guardians other than the next of kin of minor lunatic or idiot proprietors of shares in joint undivided estates not under the Court of Wards. [PHEAR, J.—It is necessary for your case that the lunatic should have been an adult and sane when he took the estate.] Act XL of 1858, s. 2, provides that "the care of the persons of all minors (not being European British subjects) and the charge of their prop-

penses incurred in a suit brought as against the whole estate. This was, therefore, an act every way beneficial to the minor, and consequently the sale of his share by his guardian is fit to be held valid by the Court." There is an express finding here that the sale to the plaintiff's was beneficial to the estate, and that the necessity which called for it arose out of a suit which was pending at the time. It appears from the statement of the pleader for the special appellants that the suit was brought by Duryao Lal for himself and for his minor brothers, in order to have it declared that a certain tenure set up by one Raout Sahoy was not a mukurari tenure; and that Duryao Lal was eventually successful in that suit. This being so, and the lower Appellate Court having found as a fact that the bringing of the suit was

beneficial to the whole estate, we, sitting in special appeal, cannot say that there is anything wrong in that finding merely on a consideration of the possibility that it might have been equally beneficial to the estate if the suit had not been instituted till the minor brothers had attained their full age.

On the whole, the lower Appellate Court finding as a fact that the deed of sale was executed by Duryao Lal for himself and as *de facto* guardian of his brothers, and the Court further finding that full consideration was paid, and that the money paid was applied for the benefit of the property, and that the transaction was beneficial to the minors, I think that the judgment of the lower Appellate Court must be upheld, and both these special appeals must be dismissed with costs.

party shall be subject to the jurisdiction of the Civil Court." This provision is wholly wanting in Act XXXV of 1858, and it is submitted that, under Regulation V of 1799, the Civil Court is prevented from interfering in the management. It is not necessary for all purposes that the guardian of a minor should have a certificate—*Mussumat Shoooghury Koer v. Boshisht Narain Singh* (1), and the same principle applies to lunatics—*Goureenath v. The Collector of Monghyr* (2).

The notice of foreclosure was rightly served on the mother : till the estate was vested in the Court of Wards, she was the "legal representative" within s. 8 of Regulation XVII of 1806—*Ras Muni Dibiah v. Pran Kishen Das* (3). She was so, at least, if the mortgage was rightfully made, and that would depend upon whether it was necessary. The necessity is abundantly shown by the evidence.

Baboo *Romesh Ohunder Mitter* on the same side.—Under Regulation V of 1799, s. 3, Lukhee Kowar was the legitimate guardian of her son. Act XXXV of 1858 does not necessitate the appointment of managers in all cases, or, in other words, there may be managers competent to act who have not been appointed by the Court. S. 14 only applies to managers so appointed. [PHEAR, J.—Then it was a mistake of Lukhee Kowar applying for a certificate, since its sole effect would have been to limit her powers ?] Yes : when s. 14 does not apply, the manager may lawfully alienate without the Court's permission, provided there be necessity ; as to what constitutes necessity, see *Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree* (4). [PHEAR, J.—Regulation V of 1799 gives no power of alienation ; it only entitles the lawful guardian to possession without stating who is the lawful guardian : moreover, the Regulation only applies to cases of inheritance.] By the Hindu law the mother would be the lawful guardian of a minor, and I submit that by analogy she would be the lawful guardian of a lunatic.

Lukhee Kowar was the *de facto* manager, and in point of principle, there is no distinction between a person rightfully, and a

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(1) 8 W. R., 331.

(3) 4 Moore's I. A., 392.

(2) 7 W. R., 5.

(4) 6 Moore's I. A., 333.

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person *de facto*, in possession—*Hunoomimpersaud Panday v. Mussumat Babooee Munraj Koonweree* (1). [PHEAR, J.—It goes to the *bona fides* of the transactions. The lender must believe not in the necessity only, but also that the *de facto* manager has the legal right to borrow.]

Mr. Woodroffe in reply.—Regulation V of 1799 deals only with cases of testacy and intestacy, and has reference to the time when the inheritance opens. If s. 3 applies to cases of lunacy, it is in conflict with the rule of Hindu law which prevents a lunatic from being heir. The person entitled to take possession under that section was not invested with the powers of a guardian, still less with those of an owner. Being found too general in its terms, Regulation I of 1800 was passed to provide for the appointment of guardians, but it did not constitute the guardian manager of the lunatic's estate. Then came Regulation XVII of 1805 for the appointment of managers; s. 5 provides that the guardian appointed by will or by the Civil Court shall be manager, but it intentionally omits the person who takes possession as next of kin. Such persons, therefore, had no greater powers than those conferred by Regulation V of 1799, *i.e.*, they are only empowered to take possession. There is moreover no evidence that Lukhee Kowar was next of kin to her son. Act XXXV of 1858 consolidated the law relating to lunatics. Unlike Act XL of 1848, it does not repeal any portion of Regulation V of 1799, but for this simple reason that that Regulation was not passed *in pari materid.* It is contended that Act XXXV of 1858 vested the Civil Court with an optional jurisdiction, but the word "may" used in s. 2 and the following sections must be read "shall"—Dwarris on Statutes, 712; *Orake v. Powell* (2) and *Anand Chandra Pal v. Panchilal Sarma* (3). Neither by English, nor by Hindu law, is there any analogy between the cases of minors and lunatics; the nullity of a minor's deed must be specially pleaded, that of a lunatic is admissible under the general issue—*Thompson v. Leach* (4), *Yates v.*

(1) 6 Moore's I. A., 393.

(3) 5 B. L. R., 691.

(2) 2 E. & B., 210,

(4) 2 Vent., 198.

Born (1). *Gowraenath v. The Collector of Monghyr* (2) is distinguishable from the present case: there the alienation was by the *kurta* of an undivided Hindu family. An enquiry into the borrower's authority forms an essential element in the *bona fides* of a loan like this.

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Cur. adv. vult.

The judgment of the Court was delivered by

PHEAR, J. (who after stating the pleadings and issues as above, continued).—The case has been fully tried, and the Subordinate Judge has given a decree in favor of the plaintiffs. His judgment is certainly in some respects remarkable. He says:—"It is an admitted fact that the defendant is a lunatic; he is not, therefore, legal heir of his father, but his mother is the sole heir of Chowdhry Kissendyal Sing, deceased. * * * It is patent that the lunatic has no *locus standi*, and that his guardian and proxy, as a matter of law, cannot raise any objection as to the legality and validity of the transaction. It is manifest from the above that the lunatic is not the heir of his late father, and that his mother is the heir under the shastras." The Subordinate Judge then argues that, although the Musumat did in fact execute the deed as if on behalf of her son, yet "the contract was made in her proprietary, and not in her fiduciary, character, and therefore the contract was not vitiated on that account." The lower Court says that its findings on this head "are sufficient for the disposal of the case," and accordingly it gives a decree to the plaintiffs for possession of the mortgaged premises, together with costs. It thus appears to have altogether escaped the notice of the Judge that the suit was brought against the idiot alone, as represented by the Court of Wards, and that the Musumat, his mother, was no party to the suit in any way. If, therefore, the Court's finding that the property did not belong to the lunatic be correct, still the plaintiffs, in order to succeed, must make out their own title to possession, and that they cannot do on the facts

(1) 2 Str., 1104.

(2) 7 W. R., 5.

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which they themselves put forward, without showing something more than the mortgage made to them of the property by the real owner; they must, in addition, show that the real owner's equity of redemption has been foreclosed, so that the full title to the property and to possession of it has passed to them. But obviously they cannot do this, because no suit for the purpose of foreclosing the equity of redemption has been brought against the owner excepting this suit; and if the lunatic be not the owner of the estate, this suit is worthless for the purpose of foreclosing the real owner's equity of redemption, and consequently that equity is still outstanding. It would seem clear, therefore, that, on the finding which the lower Court has come to, it ought to have dismissed the suit with costs.

But, further than this, it is beyond question of the essence of the plaintiffs' suit that the property belongs to the lunatic, and I need not say that, according to Hindu law, a lunatic may possess property. No issue was raised in the first Court, or suggested by either party for any purpose connected with the suit, relative to the lunatic's proprietary right. The Subordinate Judge was, therefore, quite wrong in raising himself for the first time in his judgment an issue of fact of this kind, and then determining it upon the evidence before him, notwithstanding that the parties did not themselves desire it, and had not had an opportunity of bringing any evidence to bear on the point. It might well enough be in this case, and would accord with all the facts that are stated or proved, that Kashopershaud became insane after he had succeeded to his father's property. As the case stands, we must certainly take it that the property which was mortgaged by the Mussumat to the plaintiffs was at the time of the mortgage transaction the property of her son Kashopershaud, and that he was then an idiot or lunatic. It therefore becomes necessary to enquire what was the state of the law at the period when the mortgage was effected, so far as it bore upon the matter of the alienation of the lunatic's property.

Now I apprehend it is quit clear, as I have already said, that a Hindu being a lunatic may nevertheless have property, even though he is not capable of taking property by inheritance in

the event of his being lunatic at the time when the inheritance opens to him. But if a lunatic has property, it is, then, I think, quite certain that by Hindu law he cannot himself make valid contracts binding either on himself or on his property. If it is necessary to refer to authority for this purpose, it may be found in Menu, both as given in Sir William Jones' edition, and in the text given in Colebrooke's Digest. The text 11 in the 2nd Book, ch. 2, s. 1 of Colebrooke's Digest, headed Menu, runs thus :—" A contract made by a person intoxicated or insane, or grievously disordered, or wholly dependent, by an infant or decrepit old man, or by a person without authority, is utterly null." Again, the following text of Yajnavalkya :—" A contract made by a person intoxicated or insane, or grievously disordered, or disabled, by an infant, or a man agitated by fear or the like, or in the name of another by a person without authority, is utterly null."

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Therefore, all dealings with the property of one who is insane, if dealings can be effected so as to be valid and binding upon it, (and obviously such property needs to be managed as much as any other), must be made by the hands of a guardian or a manager; and the Hindu law, as I understand it, recognized this necessity quite as early as it laid down the disqualifications which I have referred to; and I think it is undoubted that (to adopt the generalization of Sir Thomas Strange) the supreme civil power is the authority to appoint an efficient manager and guardian of a disqualified person's property. In *1 Strange*, ch. 3, cl. 4, Sir Thomas Strange says :—" With respect to the relation of guardian and ward, the king, as he is, by the Hindu law, failing all others, the ultimate heir of all, Brahmins excepted, so is he, to an extent beyond what is recognized by us in our Court of Chancery, the universal superintendent of those who cannot take care of themselves. In this capacity it rests with him, i. e., with the judicial powers exercising for him this branch of his prerogative, to select for the office the fittest among the infant's relations; preferring always the paternal male kindred to a maternal ancestor or female." For this position, Sir Thomas Strange refers to Menu, ch. 8, sl. 27, and also to some texts in Colebrooke's Digest

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Slas. 27 and 28 of Menu's 8th ch, run thus: 27.—"The property of a student and of an infant, whether by descent or otherwise, let the king hold in his custody, until the owner shall have ended his studentship, or until his infancy shall have ceased in his sixteenth year." 28.—"Equal care must be taken of barren women, of women without sons, whose husbands have married other wives, of women without kindred, or whose husbands are in different places, of widows true to their lords, and of women afflicted with illness." And the propriety of giving an extension to Menu's words such as to make them applicable in regard to all persons incapable of taking care of themselves, as Sir Thomas Strange has given it, has been recognized many times in this Court. I will only now refer to a case which was quoted by both sides in argument before us, namely, *Goureenath v. The Collector of Monghyr* (1).

No doubt, the Court, when representing the supreme authority in appointing a guardian, is bound to choose the fittest and most proper person from among the disqualified person's relations who can be found for the purpose, and in this sense it has been recognized that the father is the legal guardian of his minor children, in default of the father, the mother, and so on. The technical term thus arising—legal guardian—was used in argument before us, and insisted upon with some force for the purpose, as I understood the learned pleaders, of leading the Court to the conclusion that the mother, in this particular case, was by Hindu law the guardian *de jure* in the sense which the Privy Council seem to have given to that phrase in the new celebrated case—*Hunoomanpersaud Panday v. Mussamat Babooes Munraj Koonwree* (2). But it seems to me that, according to the true principle of Hindu law, the legality of the guardianship ultimately depends upon the appointment to the office of guardian by the supreme civil authority as represented by the Court. The guardian, when thus duly appointed, no doubt, has certain powers of dealing with the disqualified person's estate, and of making contracts with respect to it which shall be as binding as if they had been made by the owner himself. And it may, I

(1) 7 W. R. 5.

(2) 6 Moore's L. A., 393.

suppose, be taken as a general rule of equity that any one dealing *bonâ fide* for valuable consideration with one who is *de facto* guardian within the limits of the powers which such a guardian, if acting *de jure*, would have in respect of his ward's property, will be relieved from the necessity of enquiring whether the *de facto* guardian is also *de jure* guardian,—that is, whether he was originally duly appointed or not.

Up to the year 1858, no special rules or enactments, as far as I am aware, existed to govern the action of the Courts in the matter of appointing a guardian or manager for a lunatic generally. We have on this point been referred to the Regulation passed in 1793, and to two or three other Regulations passed subsequently. But I think it is admitted by both sides that there was no Act which was generally applicable to all cases of lunatics until the date of the passing of the Act XXXV of 1858. Now, by that Act, a particular course is marked out for the Court to pursue in regard to appointing a guardian or a manager of the lunatic's estate; and I apprehend that, after the date of the passing of this Act, an appointment of a guardian or manager of a lunatic's estate could not be properly effected in any other manner than in the special manner prescribed by that Act. Possibly, though as to this I desire to express no judicial opinion, even since the passing of that Act, third parties may, under some circumstances, be held to have dealt *bonâ fide*, with a manager acting *de facto* not duly appointed, and on that ground be relieved, under the general principles of equity to which I have referred, from the necessity of enquiring whether or not the *de facto* manager is also *de jure* manager, provided always the dealing in question falls within the area for which a *de jure* manager has undoubtedly powers to deal in respect of his ward's property. But in the present case it is all-important to bear in mind that the Act of 1858 not only prescribed a particular proceeding as the method to be followed in appointing a manager, but also limited the powers of the manager when so appointed, in regard to the aliening and encumbering of his ward's property. And it seems to me that whatever may be the true limit of the application which ought to be made of the above referred to equitable principle in favor of a *bonâ fide*

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purchaser for valuable consideration, since the passing of this Act at any rate, no such application can be made as would have the effect of giving a *de facto* manager, not being a manager *de jure*, a greater power of aliening and encumbering than a *de jure* manager would have : for such an application of the principle would have the effect of reducing the enactment of 1858 to a nullity.

I now come to the critical point in this case. The plaintiffs, although they say in the plaint that the Mussumat was appointed manager, have not attempted for one moment to prove any *factum* of appointment, and I suppose that they simply relied upon the equitable presumption being made in their favor for the support of their allegation. Not only, however, have they not proved it, but I believe it is admitted by the plaintiffs' advisers that the statement made on behalf of the lunatic is true, namely that the widow never was appointed; and that, although she did in fact make an application to the Court for appointment, her application was refused. So that it is abundantly clear that the person from whom the plaintiffs say they obtained their title was not duly appointed as by law was necessary in order to give her *de jure* power to deal with the lunatic's estate, and it is also further apparent, and indeed the plaintiffs did not allege it that the person from whom the plaintiffs pretend to have got their mortgage did not give it to them under the sanction of the Court, without which sanction no good title could be passed by the manager under the Act of 1858. The case of the plaintiffs is simply that there was necessity, and that in the event of necessity, the manager has the requisite power. I think this position is not tenable now. I think it would be almost absurd to hold that a manager, acting without proper authority, is in this respect more free and more favorably situated than is a manager duly appointed. It seems to me in short that the plaintiffs fail entirely to make out their title, because they are unable to show that the provisions of s. 14, Act XXXV of 1858, were complied with in their case. The words of that section are:—"Every manager of the estate of a lunatic appointed as aforesaid may exercise the same powers in the management of the estate as might have been exercised by

the proprietor, if not a lunatic: and may collect and pay all just claims, debts, and liabilities due to, or by, the estate of the lunatic. But no such manager shall have power to sell or mortgage the estate or any part thereof, or to grant a lease of any immoveable property for any period exceeding five years, without an order of the Civil Court previously obtained." No such order of the Civil Court empowering the Mussamut to mortgage the lunatic's property, or to otherwise aliene it, was obtained or attempted to be obtained. I think, therefore, that the plaintiffs have got no title under the alleged deed of *bybilwafa* against the estate of the lunatic, who is represented in this suit by the Court of Wards. It follows then upon this ground alone that the suit must be dismissed.

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I wish to add that, upon the evidence which has been minutely analyzed before as by both parties, I am by no means satisfied that there was a debt, or were debts, so pressing upon the estate as would constitute a legal necessity for mortgaging it upon the ground put forward by the plaintiffs. And, indeed, less sufficient evidence of payment of the alleged debts than that which is in the record I have seldom seen. It may be well enough, for anything that the witnesses deposed to, that several of the bonds which the plaintiffs maintain have been paid off with their money are still out standing, and may yet be put in force at some subsequent period. We really know nothing whatever upon this point. The original bonds have not been produced,—have not been accounted for. And so far as there was anything proved by the plaintiffs in the shape of a charge or inchoate charge upon the estate, I may say that in not one instance had it ripened into actual pressure. The mortgage of the whole estate, which the plaintiffs alleged that they obtained, seems to me to have been at least as great and exhaustive a burden as that which it pretends to replace. In fact, if they had established their case, it would have shortly come to this, namely, that they really swallowed up the whole of the lunatic's property in the place of those creditors whom they say they had paid off. Of course, this result is not itself sufficient ground whereon to dispose of the plaintiffs' case, but it seems to afford strong reason for scrutinizing very closely the whole mortgage-proceedings,

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and for insisting upon strict proof of the plaintiff's material allegations.

It is unnecessary, however, that I should say any thing further upon the merits of the plaintiffs' claim. We confine ourselves simply to dismissing the suit with costs.

Appeal allowed.

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March 11, &
13.

Before Mr. Justice Markby and Mr. Justice Birch.

SOODHARAM BHUTTACHARJEE AND ANOTHER (DEFENDANTS) v.
ODHOY CHUNDER BUNDOPADHYA (PLAINTIFF).*

Act XX of 1866, ss. 18, 50, 100—Registration—Priority.

See also
15 B.L.R. 295.

A mortgaged a tank in 1859 to the plaintiff. The mortgage was never registered. A in 1867 sold the tank to C, and executed a deed of sale thereof. The deed of sale was duly registered, and C, had been ever since in possession under it. The plaintiff sued A on his mortgage, and in that suit C intervened and was made a defendant. A did not appear in the suit. *Held*, that C having registered his deed of sale, and being in possession, his title was good against the plaintiff.

Girija Sing v. Giridhari Sing (1) distinguished.

IN this suit the plaintiff sued to recover the sum of Rs. 99-1-3, which he alleged to be due to him under a mortgage-bond dated the 9th of Joisto 1266 (23rd May 1859). By this bond, which was not registered, the defendant Kristodhone Bosa mortgaged to the plaintiff a certain tank as security for the repayment of the above-mentioned sum. After the institution of the suit, Soodharam Bhattacharjee intervened, stating that he was in possession of the tank under a duly registered deed of sale dated 4th Sraban 1274 (19th July, 1867), and given to him by Kristodhone, and thereupon Soodharam Bhattacharjee was made a party defendant to the suit. The defendant Kristodhone was summoned, but did not appear. The fact that Soodharam Bhattacharjee was in possession of the tank was not disputed.

* Special Appeal No. 980 of 1872, from a decree of the Judge of West Burdwan, dated the 18th April 1872, reversing a decree of the Munsif of that district, dated the 6th July 1871.

(1) 1 B. L. R., A. C, 14; see also *dur v. Bhikhu Chowdhry*, Sup. Vol., *Maharaju Maheswar Baw Sing Baha* B. L. R., 403.

The first Court held that the mortgage-bond relied upon by the plaintiff was a forgery, and dismissed the suit on that ground solely. On appeal the Judge held that the mortgage-bond and deed of sale were both genuine; that Soodharam Buttacharjee must be taken to have bought the tank subject to the plaintiff's mortgage; and that the registered deed of sale could not have priority over the unregistered mortgage-bond; and he reversed the order of the lower Court, and passed a decree in favor of the plaintiff. From that decree Soodharam Buttacharjee appealed to the High Court.

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Baboo Umbica Churn Bannerjee for the appellant.—The registered deed of sale must prevail over the unregistered mortgage-bond, Act XX of 1866, s. 50 (1). The mortgage-bond was no doubt executed before Act XX of 1866 came into force, but s. 100 of the Act will meet any objection raised on that ground.

Baboo Nilmadub Sen for the respondent,—Act XX of 1866 is not applicable, as the mortgage-bond was executed before that Act became law—*Girija Sing v. Giridhari Sing* (2). [MARKBY J.—But see *Mofuzel Hossein v. Golam Ambiah* (3).] It does not

(1) See Act VIII of 1871, s. 43.

(2) 1 B. L. R., A. C., 14.

(3) Before Mr. Justice Phear and Justice Sir C. P. Hobhouse, Bart.

MOFUZEL, HOSSEIN (ONE OF THE DEFENDANTS) v. GOLAM AMBIAH (PLAINTIFF).*

The 23rd July 1868.

Act XX of 1866, ss. 49, 50—Registration—Priority.

Baboo Poorno Chunder Shome for the appellant.

Baboo Debendur Chunder Ghose and Asheptash Dhur for the respondent.

The judgment of the Court was delivered by.

PEAR, J.—In this case it appears that one Abdool Wahid, the first defend-

ant, being owner of certain property after entering into a contract of sale of the property with the plaintiff, sold it again to the other defendant. The contract of sale, whatever it was between the plaintiff and the vendor (defendant), was not registered, and it seems that it was not of such a character as absolutely to require registration according to the provisions of s. 49. Act XX of 1866, in order that it should be admissible in evidence, but the kabala under which the special appellant purchased was duly registered, and after the registration, the special appellant obtained possession of the property from the vendor. Upon this having occurred, the plaintiff brought the present suit against the vendor (defendant), seeking specific performance of his contract. The present special appellant then intervened and

* Special Appeal, No.—, from a decree of the Judge of the 24-Pergunnas, dated the 2nd November 1867, reversing a decree passed by the Munsif of that district, dated the 14th February 1867.

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appear in that case when the deeds were executed. [MARKBY, J.—You have never been in possession under the mortgage-bond; if you had been, then the case of *Girija Sing v. Giridhari Sing* (1) would be applicable.] In *Girija Sing v. Giridhari Sing* (1), the Court does not rely on the mere fact of possession. S. 50 of Act XX of 1866 has not a retrospective effect. Registration in this case was only optional, Act XX of 1866, s. 18.

Baboo Umbica Churn Bannerjee in reply.

Cur. adv. vult.

was made a defendant by the Court under the provisions on that behalf of s. 73 of Civil Procedure Code. The lower Appellate Court has given the plaintiff a decree against both the defendants. The vendor (defendant) makes no remonstrance against this, but the second purchaser (defendant) now appeals specially to this Court.

It appears to me that the addition of the special appellant as a party to the case was not called for, but I cannot go to the length of saying that it was an improper exercise of discretion on the part of the first Court. As, however, the intervenor has thus become a defendant on the record, the question between him and the plaintiff in the suit is simply this, namely, whether or not the plaintiff makes out as against him such a title to the property as gives him (the plaintiff) a right to a decree for possession. The special defendant says that the plaintiff's alleged purchase is not established by the evidence, and it would seem from the finding of fact stated by the first Court in its judgment to be very doubtful, indeed, whether the transaction between the plaintiff and the vendor (defendant), upon which the plaintiff relies, really did amount to a sale of the property: whether, in short, it passed any proprietary rights to the property

or not. But assuming that it was sufficiently complete to pass from the vendor (defendant) to the plaintiff rights of property as between those two parties, still inasmuch as it was not registered, it seems to us that, by the operation of s. 50, Act XX of 1866, it cannot have any priority as regards the property comprised in it against any other authentic instrument of conveyance executed afterwards by the vendor (defendant), and duly registered. It follows then, that the plaintiff's title from the vendor (defendant), traced as it is through an unregistered instrument, cannot prevail against the defendant's title, which is deduced from the same owner under a duly registered kabala. Treating therefore, as we have already said we must, the question between the plaintiff and the special appellant as if it arose in a suit brought by the plaintiff against the special appellant to recover the property in suit, the plaintiff has not made out that he is entitled to succeed.

In this view, the decision of the Principal Sudder Ameen is erroneous in law, and must be set aside as between these two parties only. As regards the plaintiff and the vendor (defendant), it will remain undisturbed. The special appellant must have his costs in this Court and in the lower Appellate Court.

(1) 1 B. L. R., A. C., 14.

The judgment of the Court was delivered by

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BRECH, J. (who, after briefly stating the facts, continued).—The first Court found that the plaintiff's bond was a forged document, and for that reason dismissed the suit without going into the question of the validity of the deed of sale propounded by Soodharam.

On appeal the Judge held that the bond was genuine; he also held that the deed of sale was a well-attested deed, and that the bond did not interfere with it. He was of opinion that Soodharam must be considered to have bought the tank encumbered with the mortgage; and that the registered deed of sale could not prevail over the unregistered mortgage-bond. His order is not clear, but the only interpretation to be put upon it is that he gave the plaintiff a decree for the sum due, confirming his right as mortgagee of the tank.

Soodharam appeals, and it is urged on his behalf that the Judge is wrong in holding that the registered deed of sale does not prevail over the unregistered deed of mortgage.

There can be no doubt that, immediately after his purchase Soodharam obtained possession of the tank. The plaintiff raised no objection to the change of possession. He comes into Court upon an unregistered bond nearly twelve years after its execution. He is met by an allegation of possession under a registered deed of sale by his mortgagor to Soodharam. We think that there can be no doubt that the registered deed of sale must prevail over the unregistered mortgage-deed. The question is governed by s. 50 of Act XX of 1866. That section provides that "every instrument of the kinds mentioned in cls. 1, 2, and 3 of s. 18 shall, if duly registered, take effect as regards property comprised therein against every unregistered instrument relating to the same property, whether such other instrument be of the same nature as the registered instrument or not;" and if it applies, then the plaintiff's mortgage-bond being unregistered cannot prevail against the defendant Soodharam's purchase-deed, which, though of later date, was duly registered. It seems to us to be a reasonable construction of the Act that it does apply to such a case. It is contended that it

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does not, because the mortgage-bond was executed before the Act came into operation. But the provisions of this section are not new. The principles of them is contained in the previous Acts XIX of 1843, s. 2, and XVI of 1864, s. 68.

If these provisions of the Registration Act did not apply to instruments previously executed, the law of registration would be full of anomalies, and titles which were once secure would become insecure when a new Registration Act was passed. Had it been intended that these provisions should not be so far retrospective, the successive Acts, when repealed, would have been kept in force in this respect as to documents already executed. When Act XIX of 1843 was passed, express provision was made that these provisions should not apply to documents executed before a certain date. No such provision is contained in the subsequent Acts. But the explanation of s. 50 in the present Act (VIII of 1871) clearly assumes that the Act applies to deeds already in existence.

The respondent has relied on the decision in the case of *Girija Singh v. Giridhari Singh* (1), but that case is we think distinguishable. Macpherson, J., there says distinctly that, "if it were a mere question, as to which deed was to be given effect to, the plaintiff (who had purchased under a prior unregistered bill of sale) is not entitled to recover," i. e., to recover as against the defendant who had purchased under a subsequent bill of sale which had been duly registered. But the learned Judge goes on to show that the first purchaser had been eleven years in possession, and that therefore his position was "far stronger than if he were seeking possession for the first time under his deed of sale: and the question is not merely one as to the effect to be given to the deed as against a deed of later date;" and Bayley, J., also relies on the fact that the unregistered purchaser had obtained possession. The principle that runs through this and a number of other similar cases seems to be this, that non-registration will not impair the validity of a deed executed in good faith under the old law in force at the time of execution under which registration was optional, if pos-

(1) 1 B. L. R., A. C., 14

session has actually been acquired and enjoyed before the execution of the second deed.

In the case before us, the mortgagee never had possession. The mortgagor sold the property to the defendant, and the deed of sale was duly registered, and possession was acquired by the defendant. Under such circumstances the registered deed of sale must prevail over the unregistered mortgage, and the plaintiff can only obtain a decree for money lent against Kristodhone Bose.

We observe the Judge has said that the grounds of the Munsif's judgment are mere conjecture, and that his reasons are frivolous. We are wholly unable to concur in that observation. We think that they were worthy of the Judge's most careful consideration.

No decree has been drawn up by the Judge in this case except that the "appeal is decreed," a decree which it would have been impossible for the plaintiff to execute. As, however, the judgment is wrong in point of law, we set aside the decree of the lower Appellate Court, and direct that the plaintiff do have a personal decree against the defendant Kristodhone for the sum of Rs. 99-1-8, with interest at 5 per cent, from this date until payment; and that the suit, so far as it seeks to render the property purchased by the defendant Soodharam liable under the mortgage-bond executed by Kristodhone in the year 1266 B. S. (1859) be dismissed; and that the plaintiff do pay to the defendant Soodharam his costs in this Court and the Courts below.

Appeal allowed.

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PRIVY COUNCIL.

P. C.*
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January 22.

RADHABENODE MISSEK (PLAINTIFF) v. KRIPAMOYEE DABEE
(DEFENDANT)

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Mortgage in Possession—Account—Regulation XV of 1793.

In taking the accounts as between a mortgagor and a mortgagee in possession, the interest may be set-off from time to time against the rents and profits, the mortgagee only accounting to the mortgagor for any rents, profits, and interest on the same which he may have received over and above the interest due to him upon the debt.

THIS was an appeal from a decree of the High Court of the 6th October 1863, reversing a decision of the Principal Sudder Ameen of Dinapore of the 4th July 1861.

Nundololl Surma Roy borrowed Rs. 11,000, with interest at 12 per cent. on the 22nd March 1830, from Kallee Persaud Shome Roy, and as security he executed a *kobalah* of his *semin-daree* purporting to sell it absolutely. At the same time the parties executed *ikrarnamahs* to each other, of which the following was executed by Nundololl :—

I having sold half of the aforesaid *turuffs* in my own *semin-daree* on the 10th Chyte 1236 (22nd March 1830) into the hands of Kallee Persaud Shome Roy, zamindar of the *kiamuts* of the aforesaid *pergunnah*, executed an absolute deed of sale, and having at once received the value mentioned in the said deed of sale, in cash, granted a receipt for the same : and, that I have had an *ikrarnamah*, with similar conditions as those contained in the present *ikrarnamah*, executed by Kallee Persaud Shome Roy, the said purchaser, for a term of ten years, from 10th Chyte 1236 (22nd March 1830) to 30th Chyte 1246 (11th April 1840) under the following paragraphs, with a view that, if at any time I recant from any of the stipulations in the following paragraphs, then that limited *ikrarnamah* executed by the purchaser, which is in my hands, will become futile and unfit for hearing :—

* Present :—THE RIGHT HON'BLE SIR JAMES COLVILLE, SIR M. SMITH, SIR Q. COLLIER, and SIR LAWRENCE PEEL.

1st Para.—More or less the *dakhil-kharij* and registry expenses are at my (the vendor's) risk, the purchaser has no concern with it,

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2nd Para.—If, after the expiry of the term set forth in the other *ibranamah*, I, the vendor, on paying up the entire value mentioned in the *bynamah* (deed of sale) with interest, take back the *kobalah* (deed of sale) and receipt during that time, the *dakhil-kharij* expenses and the value of papers, &c., will all be in my (the vendor's) hands. The purchaser shall have no connection with it.

3rd Para.—Regarding the arrangement of the mehals mentioned in the said *bynamah*, the purchaser can dismiss or entertain *amlahs* on my (the vendor's) approval.

4th Para.—The rent of the mehals mentioned in the said *bynamah* will remain in the trust of the purchaser, and the Government revenue will be sent to the Collectorate by the purchaser. I (the vendor) shall have no connection with it.

5th Para.—The *mohurir*, peon, and others that will be employed for realizing the collections, &c., will get their stated salary, &c., according to the separate list with my (the vendor's) consent, from the purchaser, from the collections of the mehals inserted in the said *bynamah*.

6th Para.—After sending the rents of the mehals inserted in the said *bynamah* into the Collectorate, and after the deduction of salary, expenses, consummation, &c., of the entire year, whatever profits will be left, when I (the vendor) will liquidate the principal and interest, then I (the vendor) will receive the said money which is deposited, with interest at 12 annas per cent.

7th Para.—I have sold the mehals for Rs. 11,000 into the hands of the purchaser for a term of ten years; after the expiry of the term, when I (the vendor) will pay up in one lump sum the principal, with interest at 1 per cent., then I will take back the mehals inserted in the said *bynamah*.

8th Para.—The profits and losses of the mehals inserted in the said *bynamah* are in my (the vendor's) trust; the purchaser shall have no concern with it.

9th Para.—Before the expiry of the term mentioned in the attested *ibranamah* of the purchaser, when I, the vendor, in one lump sum, pay the real value inserted in the *kobalah*, with interest, then I will take back those mehals.

10th Para.—For the purpose of realizing the rents of the mehals inserted in the *bynamah*, a *mohurir* will be employed, and the said *mohurir* shall yearly adjust the *jumma-kurch* accounts to me (the

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vendor); and (the vendor) shall write my acknowledgment on the aforesaid *jumma-kurch*, the purchaser shall have nothing to do with the balance of rents, it will be in my hands.

11th Para.—From the whole of the mehals inserted in the said *bynamah*, if any civil or criminal suit or boundary dispute should arise, the expenses of the losses incurred thereby will be in my (the vendor's) responsibility, the purchaser shall have no connection with it.

12th Para.—Whatever paper out of the description and *jumma* papers of the mehals inserted in the said *bynamah*, I will make over to the purchaser in that paper; If I conceal under any excuse, any mouzah, or lands, or trees, fruitful or unfruitful, when it is known and found out of the said mouzah or lands, &c, I (vendor) will, without any excuse whatever, give into the hands of the purchaser, the produce, with interest, expended from that time.

Dated the 10th Chyete 1286 (22nd March 1830).

Both deeds were registered, and Kalee Persand was put in possession of the estates, and remained in possession till his death. and he was succeeded in such possession by his heiress the respondent.

No accounts ever were settled or made out.

On the 29th June 1852, the appellant, as the heir of Nundo-loll (he was in fact only the heir in reversion, but the tenant for life assigned her rights in his favor), sued to recover the property on the ground that the debt and interest had been paid off out of the rents; he admitted that he had not deposited the mortgage-money, being unable to do so, and the debt being in fact wiped off. He assumed that no more could be recovered by the mortgagee as interest, than the amount of the principal.

The Principal Sudder Ameen, after going into accounts to show that the net yearly profit received by the mortgagee was Rs. 924-6-4, and that a deduction had to be made in respect of one mouzah which for a time had been in the possession of the mortgagor's heiress, proceeded thus :—

"We have only to determine now how the interest shall be calculated. Plaintiff asks for a sum equal to the principal that may have accumulated. Defendant contends that the collection was not enough to pay the interest of the loan, and that he is entitled to interest on the loan for the entire period of twenty-nine years.

Mr. Macpherson, basing his opinion on the precedents of the Sudder

Court, states that, 'in taking the accounts, interest is, as a general rule, allowed on the payments of both parties. There are two modes in either of which the accounts may be made up. They may be permitted to run on from the date of the loan to the date of the settlement, interest being allowed to the one party on the whole sum lent, and to the other on the sums realized over and above the interest to which the mortgagee is entitled, from the date of realization :—or the amount collected by the mortgagee in possession may be carried first to interest, and after paying that, to the liquidation of the principal, the account being closed at the end of each year, and there being allowed from year to year only reduced interest on the reduced principal' (1). Mr. Macpherson adds that 'any agreement made by the parties as to the manner of accounting will be enforced, if not in itself illegal' (2).

Referring to the contract between the parties, we find it stipulated that, 'after paying the Government revenue and deducting the expenses, the seller shall return the purchase-money with interest, then the seller shall receive whatever may have gathered or accumulated of the profits, with interest at the rate of 12 annas per cent.'

The account, therefore, should be drawn up in accordance with the conditions adopted by the parties—that is, to give plaintiff interest on his profits for the entire period, and to give defendants interest for the entire period; but the Court is precluded by law—s. 6, Regulation XV of 1793—from awarding in any case whatever a greater sum for interest than the amount of the principal. Holding therefore, to the original stipulation made between the parties, except in so far as it may contravene the law, the amounts will be as follows:—

Due to plaintiff, calculating the profits at Rs. 924-6-4-3	
from 1237 (1830) to 15th Assar 1266 (28th June 1859)	Rs. 26 999 14 3 2
Interest on the profits from 1237 (1833) to 1254 (1847), being equal to the principal Rs. 16,639, 0 5	
Interest on the profits from 1255 (1848) to 1266 (1859)	4,575 6 10
	Rs. 21,214 6 15 0
Carried over ... Rs. 48,214 4 19	

(1) Macpherson on Mortgages, 204, 5th Ed. (2) Macpherson on Mortgages, 205, 5th Ed.

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Brought over ... Rs. 48,214, 4, 19,

RADHANATH	Deduct for Mohenderpore from 1246 (1839), the date on				
MISSE	which the estate came into Pran Money's possession—				
v.					
KRIPAMOYEE.	Principal	...	...	...	Rs. 1,388 7 10
DABER.	Interest	...	...	...	" 1,212 5 5
					<hr/> Rs. 2,600 12 15
					<hr/> Rs. 45,613 8 4

Due to defendants—

Principal	...	...	...	Rs. 11,600 0 0
Interest	...	...	...	" 11,000 0 0
				<hr/> Rs. 22,600 0 0

Due to plaintiff Rs. 23,613 8 4

If defendant suffers in consequence, it is her own fault, as she might in 1247 (1840), as soon as the term of the contract expired, have applied for the foreclosure of the mortgage, instead of suffering it to go on for twenty years longer, heedless of the law which barred her against claiming interest after the interest had equalled the principal.

I therefore decree that plaintiff receive possession of the estate claimed; that Kalee Persaud's heirs, the defendants, pay to plaintiff Rs. 23,613-8-4; that he also receive *wasilat* from date of suit to date of possession, and interest from each ensuing year, with interest on the total sum decreed at 1 per cent. per mensem."

The case having come on appeal to the High Court, a Division Bench (Bayley and Roberts, JJ.), after disposing of a technical objection, proceeded thus :—

"The next question to decide is whether the transaction was a mortgage to which the law and rulings of this Court, as to accounting in cases of mortgage, can apply? If this be a mortgage, then the argument of defendant, appellant, arising from the contention that it is a loan and deposit only, and that repayment by deposit in money is a condition precedent to any right accruing to plaintiff, must fall, and further the calculation of interest due, and payment made, must be in the manner laid down by this Court for cases of mortgage.

We think the following passage from Macpherson on mortgage, 3rd edition, indicates a fair test and guide to the answering the question whether the transaction was a mortgage or not:—"So long as the nature of a transaction is naturally such as to stamp it as belonging to a particular class of mortgage, the mere calling it by a different name, will not transfer it to another class. In one case, where there

was an absolute sale, but the purchaser gave an *ikrarnama* with a condition that, if the vendor repaid the purchase-money and interest by a fixed day, the purchaser would re-convey the estate to him, it was contended that this was a redeemable sale only, and not a mortgage by conditional sale, nor governed by the rules applicable to such mortgages. But the Court held 'redeemable sales' and 'mortgages by conditional sales' were in their nature identical, and merely different modes of expressing the same thing, and that therefore a redeemable sale could be foreclosed only in the same manner as a mortgage by conditional sale" (1).

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Applying this rule to the facts of this case, we have here the plaintiff borrowing from defendants Rs. 11,000, and making an absolute deed of sale, varied by another *ikrar* (which is the most common practice in this country for providing an equity of redemption), and making the transaction unmistakably nothing but a redeemable sale, identical with a mortgage. Although there is the expression that the Rs. 11,000 be repaid by a deposit of the amount with interest, and the profits are to accumulate at interest, until the loan be repaid, and then refunded to the borrowers, we look upon this as nothing that can alter the essential and substantial character of the transaction—that of a redeemable sale.

Thus, under the facts of this case, and the rule above cited, which in our view is applicable to these facts, this transaction is of the character of a mortgage, and not, as urged by defendant, in his appeal, a loan to be repaid by a deposit of cash, and in no way of the character of a mortgage. The case must therefore be governed on this point, as also in regard to the principle of accounting and crediting payments, first to interest, by the law and rulings of this Court on these points. That law and those rulings are so clearly laid down in the 3rd edition of Macpherson on Mortgage, pp. 248 to 254, and in respect to the calculation of interest in pages 243 and 244, that we need only refer the Principal Sudder Ameen to those passages, and desire him to re-adjust the account according to those rules. The realization should be first credited to interest, and then the account made up as laid down in the above-cited rules. In this account, the defendant to get credit by deductions, on account of Mohenderpore, as found to be set apart for the maintenance of both widows."

They then remanded the case with power to make a local enquiry as to the value.

(1) Macpherson on Mortgage, 40, 5th Ed.

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An application for review having been unsuccessful, the heir of the mortgagor now appealed to her Majesty in Council.

Sir *R. Palmer*, Q. C., and Mr. *Leith* for the appellant.—The rules laid down in the passages referred to in Macpherson on Mortgages are variable according to the terms of the contract. The express terms of this agreement made it optional with the mortgagor after the expiration of ten years to redeem on paying principal and interest ; and if he claimed his right the mortgagee was answerable for profits and interest ; and as the mortgagor showed that he received more than enough to pay the debt, no tender was necessary. The express terms of the agreement point out how the account is to be taken, viz., on one hand, the mortgage-debt with interest, which however cannot, according to Regulation XV of 1793, exceed the principal, on the other hand, the accumulated profits out of the rents with interest thereon. The express terms exclude the intention of taking the account in the usual way.

Mr. *Doyme* for the respondent.—The net profits were not equal to the annual interest, and the method proposed would be most inequitable. [Their Lordships, after hearing Mr. Doyme for a short time, said they were in favor of the respondents contention.]

Sir *R. Palmer* in reply.

Their LORDSHIPS delivered the following judgment :—

In this case the question admits of being very shortly stated. It was this, whether the ordinary rules applicable to mortgages expressed in the passage in Mr. Macpherson's book on Mortgages, referred to by the High Court, do or do not apply to the present case ? It was contended that they did not apply to the present case, because their application is expressly excluded by an agreement between the parties ; and if their Lordships had come to this conclusion, they would undoubtedly have given effect to that agreement.

The construction of the agreement which is contended for on the part of the appellant is this, that the mortgagee on his

part is entitled to the payment of the principal and of the interest on the debt, but that the payments of interest which properly would accrue, at all events annually, carry no interest themselves, which no doubt is the ordinary rule. On the other hand it is said that the mortgagor is entitled to call the mortgagee to account for the whole of the annual proceeds of the property less a few expenses of collection, and that each of the annual payments of the proceeds of the property is chargeable with interest; so that, while on the one hand, the mortgagor can charge the mortgagee with all the annual proceeds of the estate, those annual proceeds carrying interest, the mortgagee on the other hand can only charge the mortgagor with the debt and the interest, the latter not carrying interest, the result of which is certainly somewhat extraordinary—that, whereas in this case it appears very clear that the mortgaged property was an insufficient security, and that the proceeds of it fall short by some Rs. 400 a year of the interest, nevertheless, after a long period of time, the mortgagor, not having paid a farthing of the principal or interest, is entitled to a large balance on the part of the mortgagee. Of course, the parties might have so agreed if they pleased, but their Lordships would be loth to put such a construction upon the agreement, unless they were compelled to do so by very plain words.

On looking at this agreement, more especially at the 6th and 10th paragraphs, which have been often referred to, and to the precise terms of which it is not necessary to refer again, their Lordships on the whole think that these paragraphs and the agreement generally, which is drawn by no means clearly, are not inconsistent with the supposition that the parties intended that the interest might be set off from time to time against the rents and profits, and that the mortgagee was only to account to the mortgagor for any rents and profits and interest on the same which he may have received over and above the interest due to him upon the debt. Their Lordships being of opinion that that interpretation is not inconsistent with the contract according to the best construction they can give to it, it follows that the rule stated by Macpherson in general terms is not excluded by the terms of this contract.

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Their Lordships think it right also to say that, even assuming the construction which has been contentended for on the part of the appellant, certainly an unusual one in documents of this kind, their Lordships are not prepared to say that the High Court was wrong in determining that such a construction was applicable only to the first ten years; and that if the mortgagor chose at the expiration of that period to avail himself of the Regulations which permit the redemption of mortgages after the expiration of the term stipulated for, he must come in under the general terms of those Regulations which prescribe the equitable conditions required to be satisfied. Their Lordships are also of opinion that Regulation XV of 1793, s. 7, does not apply to transactions of this kind.

Under these circumstances their Lordships will humbly advise Her Majesty that the decision of the Court below ought to be affirmed, and this appeal dismissed with costs.

Appeal dismissed.

Agent for appellant : Mr. Barrow.

Agent for respondent : Mr. Mortimer.

APPELLATE CIVIL.

1873

April 2.

Before Mr. Justice Phear and Mr. Justice Ainslie.

IN THE MATT OF THE PETITION OF HADJEE ABDULLA AND ANOTHER.*

Indian Registration Act (VIII of 1871,) s. 76.—Review.—Act XXIII of 1861, s. 38.

A District Judge has no power to review an order passed under s. 73, Act VIII of 1871.

ONE Mussamut Noorun died on the 18th December 1871. After her death, her son-in-law, Reassut Hosseip applied to the Sub-Registrar of Gya for registration of a deed of gift, dated

* Rule Nisi, No. 46 of 1873, against an order of the Judge of Gya, dated the 4th January 1873.

19th November 1871, from the deceased in favor of her grandchildren. Hajee Abdoola and Burratee, the heirs according to Mahomedan law of Mussamut Noorun, objected to the registration of the deed on the ground that it had not been executed by Mussamut Noorun. The sub-registrar refused to register the deed. Reassut Hossein applied to the Judge under s. 73, Act VIII of 1871, to establish his right to have the deed registered. The Judge, Mr. Taylor, rejected the application on the ground that the execution of the deed was not satisfactorily proved. Reassut Hossein applied for a review of this judgment, and the then Judge of Gya (Mr. Craster) passed the following order :—

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“ I think the case may be admitted to argument. As a general rule every Court has power to review [its own order, and as at present advised, I see no reason for believing that this Court has not power to review its order in the present case, although no special provision for such procedure appears to have been made in the Act under which the order was passed. I direct that the case be placed upon the review file and be argued.”

Mr. *Twidale*, for Hadjee Abdoola and Burratee, moved the High Court (Phear and Ainslie, JJ.) for, and obtained, a rule calling upon Reassut Hossein “ to show cause why the order of the Judge admitting the review should not be set aside on the ground that it was made without jurisdiction.”

The rule now came on for hearing.

Mr. *Twidale* and Baboo *Romesh Chunder Mitter* in support of the rule.

Mr. *C. Gregory* and Moonshee *Mahomed Yusoof* for Reassut Hossein.

Moonshee *Mahomed Yusoof*, in showing cause, contended that the Judge had jurisdiction to review the order passed by him. Under s. 88, Act XXIII of 1861, the procedure, as prescribed in Act VIII of 1859, is to be followed in all miscellaneous cases. S. 376, Act VIII of 1859, applies not only to decrees, but to orders also. S. 76, Act VIII of 1871, lays down that no appeal shall lie from an order passed under that section. But there are

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no express words in the Act taking away from the Court the power to review its own judgment. S. 26, Act XXIII of 1861, expressly takes away the power of review in certain cases. The power to review its own judgment is inherent in every Court.

Mr. *Twidale*, in support of the rule, contended that there was no section in Act VIII of 1871 which authorized a Court to review its judgment. S. 76 of the Act renders the order final. The whole of the procedure of Act VIII of 1869 has not been imported.

The judgment of the Court was delivered by

PHEAR, J.—We think that in this case the rule must be made absolute. The judgment of Mr. Craster in admitting the review is very short. He says (*reads*).

It appears to me that the Judge has taken an erroneous view of the extent of his jurisdiction in this matter. If he were right, the consequence would be that, whereas in regular civil suits, in suits before the Collector's Court under Act X of 1859, and in suits which are dependent upon the provisions of Bengal Act VIII of 1869, the procedure for review is strictly laid down and limited in respect to the time and the cause, yet in a summary case like the present, the Court would be unrestricted in every way. It would not be obliged to confine its review to matter which was new since the former hearing, or to any of those points which are prescribed in the general Civil Procedure Code. The Judge might in fact on review hear an appeal from the decision of his predecessor upon precisely the same materials as those upon which his predecessor formed his judgment, and he might do this without any limit, as far as I see, with regard to time; and again his own decision upon review might be reviewed thereafter equally without limits as to time. The consequence would be that we should have here a perfectly unrestrained system of appeal upon appeal without any sort of limitation. And, indeed, as far as I understand the present case, the review which has been admitted is of the nature of an appeal from the judgment of Mr. Taylor. No doubt, every Court has so far the power to review its own decision as may be necessary

for the purpose of making that decision in terms accord with the intention of the Court entertained at the time of passing it: for instance, to correct verbal errors, or otherwise to make the formal decree an accurate expression of the judgment which the Court intended to pass. But I am of opinion that an inferior Court of limited jurisdiction does not possess the general power of reviewing its own decision which the Judge appears to think that every Court necessarily does possess. I may say that even the Court of Chancery in England, whose powers are as general as the powers of a Civil Court well can be, does not exercise the power of reviewing its own judgment except when error of law is apparent on the face of the judgment, or when new matter is brought to its notice which could not have been adduced before it at the time when the decree was made (1).

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On the whole then it seems to me as I have already said that the Zilliah Courts have not got the general power of reviewing their own judgments which would be necessary in order to support the exercise of jurisdiction which the Judge here has affected to make. It follows therefore that the admitting of the review was in this respect *ultra vires*, and the rule setting aside the order will be made absolute with costs.

Rule absolute.

Before Mr. Justice Mitter and Mr. Justice Birch.

SANTIRAM PANJA AND OTHERS (PLAINTIFFS) v. BYCUNT PANJA
AND OTHERS (DEFENDANTS).*

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March 7 &
15.

Right of a Shareholder in Land to Measurement—Beng. Act VIII of 1869,
ss. 25, 37, and 38.

A shareholder in a joint undivided estate cannot bring a suit under s. 37 of Beng. Act VIII of 1869 for the measurement of his share.

THIS was a suit for measurement of certain lands under s. 37 of Beng. Act VIII of 1869. The plaintiffs held their share

(1) See *Perry v. Philips*, 17 Ves., 178; *Mitford on Pleading*, 90; and *Smith's Chancery Practice*, 712 and 811.

* Special Appeal, No. 866 of 1872, from the decree of the Judge of Midnapore, dated the 14th March 1872, reversing a decree of the Additional Sudder Munsif of that district, dated the 22nd September 1871.

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as patnidars from the original owners of a twelve-anna share of a joint undivided estate. The remaining four-anna share was in the khas possession of the other shareholders.

The defendants admitted that the plaintiffs were entitled to a twelve-anna share in the lands in question, but contended that shareholders were not entitled to measure the lands comprised in their share. The Court of first instance held that the plaintiffs were entitled to measure the lands of the mouzah in suit, and the defendants were ordered to be present at the time of such measurement, and to point out the lands comprised within their respective holdings, and a decree was accordingly passed in favor of the plaintiffs with costs. From that decision the defendants appealed to the Judge of the district, and on appeal the Judge held that, as regards the question of a right to measurement, the case of *Moolook Chand Mundul v. Modhoosoodun Bachusputty* (1) decided that point in favor of the appellants, and allowed the appeal with costs.

(1) *Before Mr. Justice Loch and Mr. Justice Ainslie.*

MOOLOOK CHAND MUNDUL AND
OTHERS (INTERVENORS) v. MOD-
HOOSOODUN BACHUSPUTTY
(PLAINTIFF).*

The 30th June 1871.

Beng. Act VI of 1862 s. 10—Right of a Co-sharer to measurement—Act X of 1859, s. 112—Beng. Act VIII of 1869—Right of a Co-sharer to distrain.

Mr. C. Gregory and Baboo Debendro Narain Bose for the appellants.

Baboos Unnoda Pershad Banerjee, Chunder Madhub Ghose, and Taruck Nath Dutt for the respondent.

THE following judgments were delivered :—

LOCH, J.—This was a suit under the provisions of s. 10 of Beng. Act VI of

1862 for the measurement of an estate in which the plaintiff alleges he holds an undivided 8-annas share.

The ryots, whose land it was sought to measure and assess, denied that they were tenants of the plaintiff, and Prem Chand and another intervened claiming to be in receipt of rent.

The first Court laid down two issues : 1st, whether the plaintiff had been in receipt of rents ; and, 2nd, whether Prem Chand had been in receipt of rent.

The Deputy Collector found both issues against the plaintiff, but on appeal the Judge reversed the judgment holding that “the intervenor’s plea that his ancestors and plaintiffs’ ancestors made a division or a partition is not even proved, nor is the date of such partition even given. Such a plea cannot, therefore, be entertained. Plaintiff purchased the estate in 1269 (1862) ; and as all parties admit his proprietary right to 8-annas share of the estate weich is held ijmal, and that these

* Special Appeal, No. 126 of 1871, from a decree of the Additional Judge of Nuddea, dated the 21st November 1870, reversing a decree of the Deputy Collector of that district, dated the 11th March 1870.

From that decision the plaintiffs appealed to the High Court.

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Baboo Bhoyrub Chunder Banerjee for the appellants.—The case of *Moolook Chand Mundul v. Mодоosoodun, Bachusputty* (1)

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lands form part of the estate and are situated within it, plaintiff has a right under s. 10 of Beng. Act VI of 1862 to measure these lands, and a decree is given to him accordingly."

A special appeal was preferred by the tenants, but before the Court entered into the case, it was brought to the notice of the Judges that a Judgment had been passed by a Division Bench of this Court, E. Jackson and Ainslie, JJ., dated 15th May 1871 (a), which contained a construction of s. 10 of Beng. Act VI of 1862, which, if followed in the present case, would necessarily dispose of this appeal. The Judges there held that the applicant under this (10th) section must be the proprietor of the estate, not a shareholder only in the proprietary lands: that it was not right that such shareholders should have separate measurements; that such proceedings would be productive of great annoyance and harassment to tenants on the estate, and that the law does not say that any shareholder of an estate may apply to the Collector, and that looking to the remarkable provisions of this section, it should not be extended beyond its plain terms.

A judgment of a Division Bench of this Court, in *Shumbhoo Chunder Sadhookhan v. Kala Chand Karr* (b), per Trevor and Campbell, JJ., has been referred to as declaring that a shareholder was entitled to measure the lands of an estate; but we find that the judgment in that case was passed with reference to the provisions of s. 26, Act X of 1859, which contemplated a different state of things from that provided for by s. 10 of Beng. Act VI of 1862. S. 26, Act X of 1859, is similar in its terms to s. 9 of Beng. Act VI of 1862 which declares the rights of a proprietor of an estate or tenure or other person in receipt of the rents of

an estate or tenure to make a general survey and measurement of the lands comprised in such estate or tenure, and to invoke the assistance of the Collector should the tenant, when duly served with notice, fail to attend and point out his land; but s. 10 of Beng. Act VI of 1862 contains provisions not to be found in any section of Act X of 1859. It was enacted probably to assist auction-purchasers in discovering the lands they had purchased, and the tenants who occupy such lands. I cannot suppose that the law ever contemplated that the provisions of this section should be made use of, unless in very exceptional cases, by landholders who have been for any period in quiet possession of their estates receiving rents from the tenants.

S. 10 of Beng. Act VI of 1862 provides:—"If the proprietor of an estate or tenure or other person entitled to recover the rents of an estate or tenure is unable to measure the lands comprised in such estate or tenure or any part thereof by reason that he cannot ascertain who are the persons liable to pay rent in respect of the lands or any part of the lands comprised therein, he may petition the Collector, who shall proceed to measure the lands, and to ascertain and record the names of the person in occupation of the same; and on the special application of the proprietor or other person aforesaid, the Collector shall proceed to ascertain, determine, and record, the tenures and under-tenures, the rates of rent payable in respect of such land, and the persons by whom respectively the rents are payable." Then comes the penal clause, which is as follows:—"If after due enquiry the Collector shall be unable to measure the land, or to ascertain or record

(1) *Ante*, p. 398.

(a) *Post*, p. 401.

(b) 1 W. R., 53, 54.

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on which the judgment of the lower Court is based, and also the case of *Mahomed Bahadoor Mojoomdar v. Rajah Raj Kishen*

the names of the persons in occupation of the same, or if he shall (in any case in which such special application shall have been made as aforesaid) be unable to ascertain who are the persons having tenures or under-tenures in such lands or any part thereof, then and in any such case he may declare the same to have lapsed to the party on whose petition he has made the enquiry." Taking these words as they stand, it would follow that, if the party upon whose petition the enquiry was made was the proprietor of half an anna share in the estate, the whole of the property regarding which the enquiry took place would be handed over to him. It may be said that only so much as is in proportion to his share would be made over to him, but the law nowhere says so, nor does the law give the Collector any authority to enquire into and determine what is the share of the petitioner in the estate, but directs that in such case the Collector may declare the same i. e., the property of which the measurement and assessment is sought, "to have lapsed to the party on whose petition he has made the enquiry," be the right of that party what it may.

Possibly, if a person's co-sharers refused to join in making an application to the Collector, they might be made parties to the case, and the measurement &c., proceed in the presence of all parties and so the tenants be preserved from the harassment arising from separate measurements being frequently made by the various shareholders. All parties must be before the Collector, and therefore I concur in the view taken by E. Jackson and Ainslie, JJ., that proceedings, under s. 10 of Beng. Act VI of 1862, cannot be taken on the application of one shareholder in a joint undivided estate. Under this view of the law, I think this special appeal should be decreed, and the judgment of the lower Appellate Court reversed, and that the suit should be dismissed with costs in all Courts.

AINSLIE, J.—The question is whether the words "if the proprietor of an estate or tenure" in s. 10 of Beng. Act VI of 1862 are to be read as if they were "if any sole proprietor or any one of several co-proprietors of an estate or tenure," or whether they simply a sole proprietor or entire body of joint proprietors owning an estate or tenure.

Loch, J., has pointed out how the tenants may be harassed if every shareholder of a minute fraction of the estate is allowed to have a separate measurement, and how inconsistent the provision in the section in question is with the theory that every shareholder can separately call on the Collector to measure. I would further refer to s. 112, Act X of 1859 (and the corresponding s. 68 of Beng. Act VIII of 1869) in which it is provided that "no sharer in a joint estate or other tenure in which a division of the lands has not been made amongst the sharers shall exercise the power of distraint otherwise than through a manager authorized to collect the rents of the whole estate or tenure on behalf of all the shares in the same." The words used in the earlier part of this section are:—"The zemindar, lakhirajdar, farmer, or other person entitled to receive rent immediately from such cultivator, may recover the same by distraint and sale of the produce of the land on account of which the arrear is due." The words used to describe the persons entitled to distrain are in the singular number, and are much the same in form as those in s. 10 of Beng. Act VI of 1862, but the proviso shows that they are to be taken as limited to the owner, farmer, &c., defined lands or to the whole of the co-owners of such lands acting as one body. And it is clear that, if this were not so, the ryot might be infinitely annoyed, and the co-sharers put at a great disadvantage. Reading Beng. Act VI of 1862 by the light of this section, and it must be remembered that it is, so far as these measure-

Singh (1) on which that Court also relied, are decisions on s. 10 of Beng. Act VI of 1862, which section corresponds with s. 38 of

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ment sections are concerned, merely an extension of s. 26, Act X of 1859, and that by s. 21 (Beng. Act VI of 1862), it is to be read with and taken as part of the earlier Act. I entertain no doubt that the proper construction of "estate or tenure" in s. 10 is one that limits these terms to certain specific lands, the whole of the rents of which go to the person presenting the petition.

The provisions of s. 108 of Act X of 1859 (now s. 64 of Beng. Act VIII of 1869) also show clearly that a single shareholder's rights under the Act are by no means co-extensive with those of a sole proprietor or body of joint proprietors. He cannot sell the tenure on which the default accrued at all until he has proceeded against the moveable property of the defaulter and brought it to sale (if any be found), and when he does sell the tenure, he cannot sell it under s. 106 of Beng. Act VIII of 1866, but can only sell rights and interests of the defaulter under s. 110 of Act VIII of 1869.

I entertain no doubt that in the 10th section of Beng. Act VI of 1862, the word "proprietor" must be read as implying the sole proprietor or whole body of proprietors of the whole of the land for the measurement of which application is made.

(1) *Before Mr. Justice E. Jackson and Mr. Justice Ainslie.*

MAHOMED BAHADOOR MOJOOM-
DAR AND ANOTHER (DEFENDANTS)
v. RAJAH RAJ KISHEN SINGH
(PLAINTIFF).*

The 15th May 1871.

Beng. Act VI of 1862, s. 10—Right of a Co-sharer to Measurement.

Baboo *Romesh Chunder Mitter* and *Hem Chunder Banerjee* for the appellants.

Mr. R. T. Allan and Baboo *Unmod-
aprosad Banerjee* and *Shoshee Bhoosun
Sein* for the respondent.

The judgment of the Court was delivered by

JACKSON, J.—I do not agree with the Judge in the view he has taken of the law, s. 10 of Beng. Act VI of 1862. In the first place, I think it is most important that the applicant to the Collector under this section should prove that he "cannot ascertain who are the persons liable to pay rent in respect of the lands, or any portion of the lands comprised in his estate, and that on that account he is entitled to measure the lands comprised in his estate." These are the words of the law, and they show the state of facts upon which alone there can be an application to the Collector, and upon which alone the Collector can assist the applicant. The Judge admits that there was no enquiry made to ascertain whether any such state of facts existed. One of the tenants of the estate who objected to the application appeared and alleged that there was no truth in the averments made in the application, and that the applicant had long been in possession, and could not be in ignorance of the lands or tenures comprised in the estate, and that the application was only made to harass the tenants. But still no issue was fixed upon the point, and no enquiry made regarding it. The result is that the Collector had not jurisdiction to act in the matter, and that all the proceedings must be set aside as invalid. It is worthy of remark that some of the clauses of the section are penal, and

* Special Appeal, No. 2482 of 1870, from a decree of the Officiating Judge of Mymensingh, dated the 30th August 1870, affirming a decree of the Deputy Collector of that district, dated the 31st May 1870.

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Beng. Act VIII of 1869. The present suit is brought under s. 37 of Beng. Act VIII of 1869, the right to measure being given by s. 25 of that Act; these two sections correspond with s. 9 of Beng. Act VI of 1862. By s. 9 of Beng. Act VI of 1862, and by ss. 25 and 37 of Beng. Act VIII of 1869, "every proprietor" of an estate or tenure has a right to measure and survey his estate, and may, under certain circumstances, apply to the Court to have that right established, whereas by s. 10 of the former Act, and by s. 38 of the latter Act, the only person entitled to apply for measurement is "the proprietor." There is a significant distinction between the wording of ss. 9 and 10 of Beng. Act VI of 1862, and ss. 25, 37, and 38 of Beng. Act VIII of 1869. The case of *Shumbhoo Chunder Sadhookhan v. Kala Chand Karr* (1) has expressly decided that the owner of a fractional share of an estate has full power to measure. [BIRCH, J.—That was decided with reference to a *gantidar*.] *A fortiori*; a *patnidar*, who is the owner of a superior tenure, would have such a right. [BIRCH, J.—S. 68 of Beng. Act VIII of 1869 expressly bars the right of a sharer in a joint estate to distrain for rent.] I submit that is in my favor, inasmuch as wherever the rights of a shareholder are limited by Beng. Act VIII of 1869, they are so limited by express provision.

Baboo Jadub Chunder Seal for the respondents.—The mean-

deprive the ryot of his tenure. It is, therefore, the more important that no proceedings should be taken under this section except in instances where the interference of the Collector is absolutely necessary, and in such exceptional circumstances as are laid down in the section. The applicant must first prove what steps he has taken to obtain the knowledge of the tenures in his estate, and that he is unable to measure because he cannot ascertain them. The applicant in this case makes general assertions, but does not state what steps he took to ascertain the tenures, and how he failed.

I think also that the applicant under this section must be "the proprietor

of the estate," not a shareholder only in the proprietary body. It is not right that such shareholders should have separate measurements. Such proceedings would be productive of great annoyance and harassment to the tenants in the estate. The law does not say that any shareholder of an estate may apply to the Collector; and looking to the remarkable provisions of this section, it seems to me that it should not be extended beyond its plain terms.

I would set aside the Judge's order and dismiss the plaintiff's application with all costs.

(1) 1 W. R., 53, 54.

ing of the word "proprietor," as used in Beng. Act VI of 1862, has been defined in *Mahomed Bahadoor Mojoomdar v. Rajah Raj Kishen Singh* (1), in *Moolook Chand Mundul v. Modhoosoodun Bachusputty* (2), and in *Shoorendro Mohun Roy v. Bhuggobut Churn Gungopadhy a* (3). A shareholder cannot sue

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(1) *Ante*, p. 401.

(2) *Ante*, p. 398.

(3) *Before Mr. Justice Kemp and Mr. Justice Glover.*

SHOORENDEO MOHUN ROY AND
OTHERS (PLAINTIFFS) v. BHUGGO-
BUT CHURN GUNGOPADHYA
AND OTHERS (DEFENDANTS).*

The 6th August 1872.

*Beng. Act VI of 1862, s. 10—Right of a
Co-sharer to Measurement.*

Baboos Sreenath Doss, Shosheebhooson Sein, and Girjasunker Mojoomdar for the appellants.

Baboos Nulit Chunder Sein and Issur Chunder Chuckerbutty for the respondents.

THE judgment of the Court was delivered by

GLOVER, J.—These appeals have been heard together, and one decision will govern both cases. The matter has been extremely complicated by the action of the Courts below, and it is with some difficulty that we have been able to get to the real state of the case. The suit is by a 2-annas co-sharer in an estate called Rooil, for a measurement of the lands under the provisions of s. 10 of Beng. Act VI of 1862, his ground of action being in accordance with that section that he wishes to know, and cannot ascertain who are the persons liable to pay rent in respect of the lands of his estate unless a measurement is made. The Collector in the first instance, notwithstanding the objections

which were made by the opposite party that such a suit would not lie, ordered the measurement to be made. The Judge on appeal confirmed that order, and sent the papers back that an ameen might be deputed to make the measurement. Sometime afterwards a different Collector took up the case, and expressed a very decided opinion that it ought never to have been brought under Beng. Act VI of 1862 at all; he ordered however the ameen to go out and measure the lands, considering himself bound, as no doubt he was, under the circumstances by the decision of the Judge's Court. The ameen thereupon went and measured the lands, both parties objected to his measurement on various grounds, and the Collector gave a decision, which was partly in favor of each. The case then went on appeal to the Judge, who upheld the decision of the Collector, and it is against this decision that the present appeals are made. The only point necessary for us to consider in special appeal is the point of law, namely, as to whether a co-sharer in an undivided estate or tenure is entitled to apply under s. 10 of Beng. Act VI of 1862 for a measurement.

We are clearly of opinion that he is not so entitled. The words of the section are that "if a proprietor of an estate or tenure or other person entitled to receive the rents of an estate or tenure." We understand "proprietor" to mean either the sole owner of the estate, or the corporate body of owners acting together for that purpose, or any person or body of persons having the right to collect the entire rents of the entire estate. There is nothing in the

* Special Appeals, Nos. 174 and 276 of 1872, from the decrees of the Judge of Dacca, dated the 30th September 1871, modifying and affirming the decrees of the Collector of that district, dated the 30th June 1871.

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for rent or enhancement of rent, or for a kabuliat without joining his co-sharers. [MITTER, J.—That rests on a different principle; a shareholder may not have the rights you mention, and yet may be well entitled to know the quantity of land which forms his estate.] Separate measurements at the instance of each shareholder would be harassing to the tenants. [MITTER, J.—It is not necessary that the tenants should attend at the measurements.] The proper course for a shareholder to pursue is to obtain a partition, and thus become sole proprietor of his share.

Baboo Bhoyrub Chunder Banerjee in reply.—In the case of *Moolook Chand Mundul v. Modhoosoodun Bachusputty* (1), a distinction was drawn between cases arising under ss. 9 and 10 of Beng. Act VI of 1862. Under the circumstances I submit that the case ought to be referred to a Full Bench. The plaintiffs could not obtain a partition as they are patnidars of a twelve-

section which entitles a fractional shareholder in the property against the wishes of the great mass of his co-sharers to harass every ryot on the estate by insisting upon a measurement of the lands. The point in question has on more than one occasion been decided by Division Benches of this Court. In the case of *Moolook Chand Mundul v. Modhoosoodun Bachusputty* (1), it has been held that the word "proprietor" implies the sole proprietor or the whole body of proprietors of the land for the measurement of which application is made: and again in the case of *Mahomed Bahadoor Mojoondar v. Rajah Raj Kishen Singh* (2), it was held that an applicant under s. 10 of Beng. Act VI of 1862 must be "the proprietor of the estate," and not a shareholder only in the proprietary body. Another objection and an equally fatal one to the plaintiff's case would be that a party applying for a measurement must do so because he cannot ascertain who are the persons liable to

pay rent to him. Now this is an estate which has been settled for very many years, the mehal was measured when it was settled, and, as observed by the Collector, there was a full record of the tenures of the estate, so that there could have been no difficulty in ascertaining from the thakbust proceedings what were the holdings of every particular ryot on the estate. In every point of view, therefore, the decision of the Court below is erroneous. It is true that the Judge has not now decided the case on this particular point, but it is equally true that the objection was taken by the objector before him from the very beginning of the case, and it is on this point that the appeal is preferred.

We reverse the decision of the Courts below, and reject the application for measurement.

Special appeal No. 174 will therefore be decreed, and special appeal No. 276 will be dismissed with costs.

(1) *Ante*, p. 393

(2) *Ante*, p. 402.

anna share, and the remaining four-anna share is in the possession of the original shareholders.

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Cur. adv. vult.

The judgment of the Courts was delivered by

MITTER, J.—In this special appeal we think we are bound to follow the principle laid down in the decisions in *Moolook Chand Mundul v. Modhoosoodun Buchusputty* (1) and *Shoorendro Mohun Roy v. Bhuggobut Churn Gungopadhya* (2). It has been argued that these were cases decided with special reference to the provisions of s. 10 of Beng. Act VI of 1862 and s. 38 of Beng. Act VIII of 1869. But the principle of those decisions appears to be equally applicable to a case like the present, which is brought under s. 37 of the last mentioned Act. The same words “proprietor of the estate or tenure” which occur in s. 38 of Beng. Act VI of 1862 also occur in s. 25 of Beng. Act VIII of 1869; and as it is by s. 25 that the right to measure referred to in s. 37 is to be determined, the distinction relied upon by the appellants must necessarily fall to the ground.

We reject the special appeal with costs.

Appeal dismissed.

(1) *Ante*, p. 398,

(2) *Ante*, p., 403.

PRIVY COUNCIL.

P. C.*
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NOGENDER CHUNDER GHOSE AND ANOTHER (PLAINTIFFS) v. MAHOMED ESOF AND OTHERS (DEFENDANTS).

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Alluvion—Diluvion—Accretion—Regulation XI of 1825, s. 4 (1).

See also
14 B L R 223
14 B L R 269

Where a *chur* formed in the middle of a river, and was settled with A, and by the recession of the river new land appeared, which was really a deposit on the ancient site of B's land though adhering to the *chur*, it was held to be B's land.

The first rule established by s. 4, Regulation XI of 1825, does not apparently contemplate land other than that commonly known as alluvion, *vis.*, land gained by gradual and imperceptible accretion, the *incrementum latens* of the civil law. There is no express provision in the Regulation for the case of land which has been lost to the original proprietor by the encroachment of the sea or a river, and which, after diluviation, re-appears on the recession of the sea or river, and there is nothing to

(1) *Reg. XI of 1825, s. 4. First.*—“When land may be gained by gradual accession whether from the recess of a river, or of the sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed, whether such land or estate be held immediately from Government, by a zemindar, or other superior landholder, or as a subordinate tenure, by any description of under-tenant whatever. Provided that the increment of land thus obtained shall not entitle the person in possession of the estate or tenure to which the land may be annexed, to a right of property or permanent interest therein beyond that possessed by him in the estate or tenure to which the land may be annexed, and shall not in any case be understood to exempt the holder of it from the payment to Government of any assessment for the public revenue, to which it may be liable under the provisions of Regulation II of 1819, or of any other Regulation in force.

Nor, if annexed to a subordinate tenure held under a superior landholder shall, the under-tenant whether a *khoo-d-kast* ryot holding a *maurasi istemraee* tenure at a fixed rate of rent per *beegha*, or any other description of under-tenant liable by his engagements, or by established usage to an increase of rent for the land annexed to his tenure by alluvion, be considered exempt from the payment of any increase of rent to which he may be justly liable.”

“*Fifth.*—In all other cases. *vis.*, in all cases of claims and disputes respecting land gained by alluvion—or by dereliction of a river or the sea—which are not specifically provided for by the rules contained in this Regulation, the Courts of Justice in deciding upon such claims and disputes shall be guided by the best evidence they may be able to obtain of established local usage, if there be any applicable to the case, or if not by general principles of equity and justice.”

* *Present*:—THE RIGHT HON'BLE SIR JAMES COLVILLE, , SIR R. PHILLIMORE, AND SIR M. SMITH.

take away or destroy the original proprietor's right; such a case is to be determined by the general principles of equity and justice under the 5th rule contained in s. 4.

A title founded on the original ownership and identification of land re-appearing is to be confined *prima facie* to the re-formation on that site.

The cases of *Mussamat Imam Bandi v. Hurgovind Ghose* (1), *Lopez v. Maddan-mohan Thakur* (2), and *Eckowri Sing v. Hirulal Seal* (3), commented on.

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THIS was an appeal from two decisions of the High Court (Kemp and Seton-Karr, JJ.) at Calcutta, the first dated 1st December 1865, and the other (on review) dated 1st April 1867, reversing a decision of the Judge of Chittagong dated the 11th June 1863.

The facts of the case were as follows :—

The navigable tidal river Kurnafoolee is one of those great rivers of India, whose volume of water and rapidity of current at certain times overflow, inundate, and carry away extensive tracts of surface soil : and at other times recede from, or form deposits of soil on the original sites of the land so inundated. That river running north and south, separated the zemindary of Anundonarain Ghose, now represented by the appellants, which was on the eastern bank, within the jurisdiction of Thanna Potea, from the estate of the respondents, sometimes called Mouzah Bakolea, which was on the opposite and western bank, within the jurisdiction of another thanna called Sohur.

In the year 1837, the Mouzahs Kalagaon, Chukra, and Lakhera, forming part of the said zemindary, were surveyed and measured by the Government Deputy Collector of the millah, and were divided into *dags*, which were respectively distinguished by numbers, and in the year 1839 Mouzah Bakolea was also surveyed and measured, and divided into *dags*, distinguished respectively by numbers.

In June 1847, settlements were made by the Collector on the part of the Government, as zemindar, with the then proprietors of the said Talook of Bakolea of two churs, Dukrin and Durmeen, which had been thrown up in the river. The former chur was stated to contain 22 drones, 10-18-1-1 of land, the jumma being Rs. 200-6-6 ; the latter chur was stated to contain

(1) 4 Moore's I. A., 403.

(3) 2 B. L. R., P. C., 4 ; S. C., 52

(2) 5 B. L. R., 521 ; S. C., 13 Moore's Moore's I. A., 136.

F. A., 467.

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16 drones, 18-2-1 of land, the jumma of the same being Rs. 212.7-7,

Subsequently to the measurements in 1837, the greater part of the surface land of the three mouzahs, part of the appellants' zemindary, became diluviated by the river; but afterwards a re-formation of land took place upon the original site, there remaining between the newly-formed land and the original lands which remained intact, only a little *khal*, called the Bowal khalee, which it appeared became dry during the lowest ebb-tide, and was easily fordable by men and animals, and which extended over the land of some of the *dags* of these mouzahs.

In the year 1848, Anundanarain Ghose presented a petition to the Collector of the zillah, stating (amongst other things) that a large amount of the lands, of Mouzah Kolagoao had been diluviated or washed away by the river, and praying on that account that other lands might be annexed to his zemindary, but no steps were taken on that petition.

In 1852 the Durmesean Chur had become entirely diluviated and Government settled with the respondents another chur which had formed opposite the plaintiff's zemindary.

Before 1854 the river had thrown up some other land towards its eastern shore, and in that year disputes arose between the respective proprietors of lands in the vicinity, as to the right of possession to that land which formed the property, now the subject of the suit, on which grass had begun to grow; and, on inquiry, the Magistrate found that no one had, up to the date of the inquiry, been in actual possession of the same, and an order was made that the said lands should be attached, and that the party entitled to the possession should obtain a settlement thereof from the Collector.

No claim being made by the Government to these chur lands, petitions were presented to the Magistrate under Act IV of 1840, by sixteen parties claiming the lands.

The Magistrate directed the darogah to make a personal investigation and draw out a map of the locality, and to report thereon, which he did; a copy of the map is opposite marked No. 43.

In his report (after referring to a portion A, as to which, a

compromise having been effected, no question was raised on the appeal) the darogah said :—

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“ The lands in Mouzah Kolagaon belonging to the zemindars Baboo Grindochunder Ghose and Sreemutty Noberungeny Dossee, which were diluviated, have been re-formed by alluvion on that site right to the west of Bowal khalee and the southern part of the chur marked A. From the said mouzah, and from the chur marked C, settled with Mahomed Esuf Chowdhry and others, men can cross over during ebb-tide to the said southern part of the chur marked A. Again, the disputed new alluvion chur marked B is an accretion to the chur marked C, settled with the said Mahomed Esuf, Abdool Ali, and others,

“ But it appears that the said disputed chur marked B has been formed by alluvion in the place where the lands of Mouzah Kolagaon, belonging to the said Baboo Grindochunder Ghose and Sreemutty Noberungeny Dossee, zemindars, were formerly broken, and during the ebb-tide men can walk on foot from the said mouzah to the said chur. That portion of the land which the petitioner Mahomed Soreef had in Mouzah Lakhera has been diluviated, but there is no trace of it in the bank of the river ; hence, it cannot be exactly determined where it has been re-formed by alluvion. In the said two disputed churs, marked A and B, grass is growing. During the flood-tide the said two churs are immersed under water.”

On the 22nd December 1854, the Magistrate passed an order which the appellants contended was contrary to the purport of the report of the darogah, and in, oposition to the facts found thereby, to the effect that the lands, the subject of the suit, should be placed in the possession of the respondents, the greater *chuck* (distinguished as B in the map of the darogah), as being an accretion to a piece of land (distinguished as C in the map), which he found to be in their possession, and the lesser *chuck* (distinguished as A in the map) as being an accretion to the Lamchi Chur, which had been settled with Mahomed Esuf in place of the Durmeean Chur (distinguished as D in the map), but which the darogah called the Durmeean Chur.

In his judgment the Magistrate said :—

“ It appears, on looking into the said map, that the new chur marked A in dispute has been formed by alluvion as accretion to the lands of the proprietors, Mahomed Esuf, Abdool Ali Chowdhry, Ermos Ally, Chand Meab, Abdool Mujeed, Horo Lal Mohant, and Datarum, in

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Mouzah Khijirpore, and to the Durmesean Chur (intervening chur) marked D, settled with Mahomed Esuf Chowdhry and others; and that the disputed new Chur B has been formed by alluvion as accretion to the chur marked C, settled with the said Mahomed Esuf and others. Both the churs marked A and B are in dispute. The said disputed new alluvial churs marked A and B, 'almost all the petitioners allege to be formed by alluvion after diluvion of the original diluviated lands belonging to them, and in their possession respectively, and that they are accretions to their respective lands, and they have claimed possession thereof. The darogah has written in his report that the lands belonging to the proprietors Baboo Horo Chunder Roy, the first petitioner, and Oomah Churn Roy, and others, which were diluviated on the west of the formerly diluviated lands, and the recently formed alluvial lands of the said Abdool Mujeed; have been re-formed by alluvion in the said chur marked A. But whose original lands were diluviated, and whose the new disputed chur was formed by alluvion, it is difficult to prove; and that matter cannot be enquired into and decided in a summary manner. The disputed chur has been newly formed by alluvion; grass only has just commenced to grow thereupon. During the flood-tide both the churs are immersed under water. It is not possible that anybody had previous possession thereof. Therefore, when there is no certainty of the previous possession in the disputed estate, according to the custom of the country, and the purport of s. 5, Act IV of 1840, it is proper to keep the disputed chur in the possession of those persons, portions of the original lands held by whom have been diluviated, and have been re-formed by alluvion accreting to the remaining original lands in their possession. From a perusal of the darogah's report and the map, it appears that the first petitioner, Baboo Horo Chunder Roy, and the seventh petitioner, Mahomed Soreef, have no original lands held by them adjoining the said chur. And between Mouzah Kolagaon, belonging to and held by the fifth petitioners, Grindochunder Ghose and Mussamut Noberungeny, and the new alluvial chur marked B, there is the old Kurnafoolee river, and it also appears that there is deep water in it that *balam* boats can easily pass by it. It is not in any way probable that the said chur is an accretion to the lands in their possession. The chur marked B is a clear accretion to the chur marked C, held by and settled with the fourth petitioners, Mahomed Esuf and others, and therefore the fourth petitioners are alone entitled to the possession of the said chur. Hence it is proper to keep the said disputed new

chur marked A in the possession of those persons, the original lands held by whom in Mouzah Khijirpore having been diluviated, it has accreted, by alluvion to the existing original lands held by them, and to the chur marked D; and that the disputed chur marked B, being an accretion to the chur marked C, in the possession of the fourth petitioners, it is proper to keep it in their possession."

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Mr. Fagan, having been appointed Receiver of the zemindary of Anundonarsain Ghose, disapproving of the finding of the Magistrate, instituted a regular suit for the recovery of the lands in May 1861.

The plaint in this suit was filed on the 3rd of May 1861 and purported to be a "claim to obtain possession" of 71 drones of land. It did not suggest that the appellants ever had possession of the land, but charged that the respondents had resisted possession being taken by the appellants in the year 1853, and had since continued in possession. It stated that the land in dispute was separated from the rest of the appellants' estate by a channel of the river, fordable only during low tide.

The respondents other than the Government by their written statement claimed the land in dispute to be an accretion to the chur on the south of Bakola, settled with them by the Government in 1847, and since then occupied by them. They charged also that the channel of the river between the land in dispute and the appellants' estate was deep enough at ebb-tide in all seasons of the year for large laden boats to ply in it. They further charged that the appellants had never been in possession of any part of the land in dispute.

The Government put in their written statement by way of answer supporting the respondents' case.

On the 5th August 1861, the Principal Sudder Ameen directed Moonshee Ashanoollah an ameen to make a local enquiry. On the 28th December the ameen sent in a report, together with a map, which are sufficiently referred to in their Lordships, judgment.

The suit being transferred from the Court of the said Principal Sudder Ameen to that of the Zillah Judge, the latter ordered an ameen called Guggun Chunder Dutt to make

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another investigation. He also made a map marked (No. 20) and a report, which are sufficiently noticed in their Lordships' judgment.

The Judge having dismissed the case as barred by limitation, the suit was on appeal remanded for trial, and the Judge directed an enquiry by another ameen, Gour Mohun Biswas. He also made a map (No. 29) and a report, which are sufficiently noticed in their Lordships' judgment.

The Judge held that the suit was not barred by limitation and on the merits proceeded as follows :—

"The local investigation, and the reports filed by both the ameens, show clearly that the land in suit is a formation on the original site of the plaintiff's estate, which was washed away by the action of the river. The defendants pleads that the land in suit is divided from the main-land by a navigable river, but this is not the case. The reports of the ameens, and the evidence of the witnesses, show that the Kurnafuolee river runs to the north of the land in suit, and that to the south of it, between it and the main-land, there is a khal, or channel, which, though navigable for good-sized boats at high water, is fordable during low water. The witnesses also who have been summoned on the part of the defendant state that at ebb-tide there is very little water in it. Mouzah Bakolea is on the north of the river. The land settled with the defendants in 1847 was entirely washed away, and this is shown by the defendant's own petition to the Collector, praying for remission of revenue on that account. The land in suit is a formation on the south side of the river, and contiguous to the plaintiff's estate. The report of the darogah, and the proceedings of the Magistrate in the Act IV case, show that the land was quite a recent formation; there is no proof that the land forms a part of, or an accretion to, the defendant's estate. The defendants also plead that the ameen has not taken into consideration the quantity of land which has been cut away since the institution of the suit. This, however, did not form a part of the ameen's instructions; he was merely directed to make out the *dags* appertaining to the estate of Dukhin Chur, and report whether any portion of it fell on the land in suit; his starting-point is not objected to, and in no way could any of the *dags* fall on the land in suit. The land in suit is clearly a formation on the original site of plaintiff's estate, and is connected with it, and the plaintiff is therefore entitled to be placed in possession. A decree is given in favor of the plaintiff against Mahomed Esuf, Ahmed Ally, Asgur Ally, Enact Ally, Amjud Ally, Dewan Bibee

and Allumnessa, who will pay 'the costs of the plaintiff, as well as those of the Collector. They will also pay the plaintiff's costs in the appeal to the High Court, namely, the pleader's fees."

On appeal to the High Court, a Division Bench (Kemp and Seton-Karr, JJ.), reversed that decision. The learned Judges, after referring to some objections taken in consequence of certain mistranslations, proceeded to refer to the report of the last Ameen, not however alluding to the former investigations.

"The report of the ameen is certainly against the defendants. It shows that the ameen found, from the papers filed by both parties, that, on measurement, the land claimed would not fall within, or be a continuation of the *dags* of the defendants. This is one point much relied on by the plaintiff, whose pleader argues that, if the defendants failed in identifying and measuring the land, the same, by position and by law, must belong to the plaintiff's estate.

"We think, however, that the report of the ameen not only is inconclusive, but that it is outweighed by other evidence and by the probabilities of the case. Unless the ameen took a correct starting-point, of which we cannot be sure, his measurement could not be relied upon, and the decision of the Magistrate in 1854, which retained the defendants in possession, discloses a state of things wholly incompatible with the version now given by the plaintiff.

"The Magistrate's decision shows that no less than fifteen people were contending for the chur; that the chur was submerged at high water, and that large boats could ply at and near the place. The Magistrate ruled that the land in dispute was an accretion to what had been settled with the defendant, and retained him in possession under s. 5 of Act IV of 1840, which, in this view of the case, he had a perfect legal right to do.

"This state of things, as found by the Magistrate in a very careful decision, is wholly opposed to the claim now set up by the plaintiff; and we observe that he slept for seven years over the adverse decision. In that time, judging from the map filed by the ameen, compared with that of the Magistrate, the river Kurnafoolee, to the south and east of the disputed place, must have silted up, or decreased in volume.

"The probabilities of the case are, moreover, wholly against the plaintiff. If the chur settled with the defendants in 1847 had wholly diluviated, whence did defendant get his starting-point in 1853-54; and how did he manage to obtain a footing on a chur which is now

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claimed as an accretion to plaintiff's parent estate, and of which the plaintiff was in that view the most likely person, from his position, advantages, and opportunities, to gain possession.

"On the whole, we are of opinion, not only that the plaintiff has failed to make out his title, but that the weight of the evidence proves the legal title, as well as the possession, to be with the defendant; and we decree the appeal with all the costs, including those of the Government."

An application having been made for a review, the same Judges on the first April 1867 dismissed the application but without costs. The following is their judgment which was delivered by

SETON-KARR, J.—This case was originally decided by us on the 1st of December 1865. The case had been previously remanded by a Divisional Bench on the 22nd of June 1864, when a plea of limitation successfully urged by the defendants, in the lower Court was overruled. The Judge on remand, gave the plaintiff a decree, and we reversed the decision on the date mentioned, holding that the plaintiff had not made out his main contention: that the lands were a re-formation and accretion to his original estate; that two churs had been settled with the defendants by Government as far back as 1847; and that one of them certainly had never wholly diluviated; and that the plaintiff had not made out a case to disturb the possession awarded by the Magistrate in 1854, or one which showed a better title.

The case has now been fully argued in review by Mr. Doyne for the plaintiffs, after notice to the successful defendants, and Mr. Doyne relies mainly on three decisions of Division Benches, *Wise v. Ameerunnissa Khatoon* (1), *Wise v. Moulvie Abdool Ali* (2), and *Kowar Poreh Narain Roy v. Watson & Co.* (3), as well as on the disclosures made by the record, which, as he contends, show clearly that no original lands remained to the defendants, to which, at the time the Magistrate's possessory award, the lands now in contention could, by any possibility, be accretions.

The point as put by Mr. Doyne on the application for review, on which point the successful defendants were again summoned is this:—"That even if the lands now in dispute originally appeared in

(1) 2 W. R., 34.

(2) *Id.*, 127.

(3) 5 W. R., 283.

the shape of an island, as contended for by the defendants, still, according to the precedents of this Court (quoted above), the legal title belongs to your petitioner, inasmuch as Government declined to assert its title thereto, until a new survey, and in the interval the lands have become an accretion to the petitioner's estate."

Mr. Doyne also contends that the Court was wrong to express doubts as to the correctness of the starting point taken by the ameen, inasmuch as no such doubts were stated by the defendants in their objections to the ameen's report.

On the other hand Kishen Succa Mookerjee has contended for the correctness of the Court's decision of December 1865, and has urged that the lands are, in a great measure, an accretion to Dukhin Chur which has never been washed away; that Government had asserted its right and had made a settlement with the defendant which still subsists, and that the rulings quoted, owing to the difference of circumstances, cannot apply.

Those rulings, *Wise v. Ameerunnissa Khatoon* (1) and *Wise v. Moulvie Abdool Ali* (2), lay it down that, if a chur be surrounded by water, fordable at any point, the owner of the land to which the chur adjoins has a *prima facie* title to it under cl. 3, s. 4 of Regulation XI of 1805 and also that the status of the land at the time of the re-survey, and not that on the first formation, is to be looked to under Act IX of 1847. It is also ruled in those two cases that, if the land attaches to the estate of a riparian proprietor, his opponent cannot retain the same unless he can show a better title than Act IV of 1840.

The same doctrine is laid down in the case of *Kowar Poresh Narain Roy v. Watson & Co.* (3), but it is to be noted that, in all these cases, Government did not claim the land thrown up, and did not take possession of it as an island.

The documents, which in the course of review have been most dwelt on, are—

1. The map of the ameen made in this enquiry, and the map of the darogah on which the Magistrate based his award.

2. The petition of the plaintiff of 28th of February 1853.

3. The petition of the defendant of the 16th of Aughran 1914 Mughsee, or 1st of December 1852.

4. The report of the Deputy Collector of the 9th of December 1852.

(1) 2 W. R., 34.

(3) 5 W. R., 283.

(2) *Id.*, 127.

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	Rakolea, at a jumma of ...	Rs.	686 4 0
v. MAHOMED ESOF.	Dukhin, at a ditto of ...	„	200 6 6
	Jungolea, at a ditto of ...	„	67 10 0
	Durmeeani at a ditto of ...	„	212 7 7

We think it also clear from the proceedings of December 1852 that only one chur had entirely diluviated, viz., Durmееani, and that, as a compensation, Government settled another chur, called Lami or Lamohi, with the defendants: this chur having formed somewhere in the same locality. The petition for the plaintiffs of February 1853, if anything, rather supports the defendants' case. We think it further indisputable that Dukhin Chur never diluviated, and that it is the chur without a name marked C, in the darogah's map. A comparison of this map with the ameen's map leaves no reasonable doubt of this fact in our minds. We also think the map of the darogah a very clear and well-drawn map, and that by D he meant, not the old durmееani chur, but the chur which had formed on its site or in its neighbourhood.

It is also clear that the claim of the plaintiff was not urged in the lower Court or before us on the last occasion in the exact shape in which it is now presented to us, though there are words in the plaint which, it is possible to argue, may cover the claim as now shaped.

We are not disposed to impugn the correctness of the principles laid down in the rulings of the Divisional Benches already quoted, but the question will still remain whether the facts disclosed in this suit are such that those rulings can fairly apply. It is indisputable in our opinion that Government did assert its claim to both Durmееani and Dukhin Churs, and that the latter has never been washed away, and we are not shown that there has been any re-survey. In this state of things then, the rulings quoted by Mr. Doynе, do not seem to apply. In those rulings the Government appeared either to have waived or neglected its rights or not to have ceded them to the parties. In the present case the Government distinctly settled at intervals four churs with the defendants, and gave them a compensation for one chur, and one chur only, which afterwards diluviated.

Then the present claim of the plaintiff, at least his claim in the shape now asserted, seems to me a new claim altogether. In his plaint he gave the chur no name in particular, but described it as an accretion to three villages of his estate, and he distinctly pleaded resistance to his possession and collusion between different defendants, and re-formation

of a chur on the original site thereof adjoining to his own original lands. I think it extremely questionable whether his claim, as put on review, is really covered by the pleas taken in his plaint; and if this be the case, I do not think that, at this late stage of the proceedings, he should be permitted to vary his ground of action, and to claim the benefit of certain decisions of our Court, the circumstances of which do not exactly apply to or tally with the case before us.

As to what is said of the ameen's report, it appears that no less than three ameens have gone to the spot, and that they have been unable to give any such conclusive report as would warrant a Court of Justice in giving away a large tract of land, and depriving the defendants of their possession. A Court is bound itself to see whether an ameen's report is in all respects reliable, before it can use it as a main ground for disturbing long possession.

The plaintiff, after the unfavorable award of the Magistrate in 1854, took seven years to brood over his case and to come into Court.

I think that, on this case as put, he was bound to prove distinctly his allegations of dispossession and obstruction by the defendants and of re-formation of a chur on a site adjoining his own lands. These allegations I do not think he has proved, and therefore, whatever may be the exact state of the chur or of the water surrounding it at the present time, I question whether under his form of action and under all the circumstances of the case, he is in a position to derive any benefit from the rulings of the Divisional Benches on this much-controverted subject of accretion, the correctness of which rulings in those instances and applied to those facts, I do not impugn.

In this view of the case, I think that our decision of December 1865, dismissing the claim as not made out, has not been shown to be wrong or illegal, and I would allow it to stand unaltered, dismissing the review but without costs.

The sons of Anundonarain Ghose appealed against this decision to her Majesty in Council.

Sir B. Palmer, Q.C., and Mr. Leith, for the appellants, contended that the decision of the Zillah Judge was right, inasmuch as the land was clearly a formation on the original site of the plaintiff's zemindary, and no part of the land settled with the defendants in 1847 was connected with the land in dispute. They commented upon the High Court having entirely overlooked the findings of the first ameens, and argued that the defendants having

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based their claim upon the land forming an increment under Regulation XI of 1825, s. 4, cl. 1, had altogether failed to prove it, and that the appellants' case had been proved according to the principles laid down in the 5th clause of that section.

The following cases were cited—*Wise v. Ameerunnissa Khatoon* (1), *Wise v. Moulvie Abdool Ali* (2), *Kowar Poresb Narain Roy v. Watson & Co.* (3), *Mussamut Imam Bandi v. Hurgovind Ghose* (4), and *Lopez v. Madanmohan Thakur* (5).

Mr. Forsyth, Q.C., and Mr. Pontifex, for the Government, contended that the land being in the possession of the defendants, the appellants must recover on the strength of their own title, and not on any deficiency in proof by the defendants, but that, besides, it was clear that the lands in question were an accretion to the Dukhin Chur settled with them by the Government in 1847. As to the cases relied on, the decision in *Lopez v. Madanmohan Thakur* (5) must be carefully considered, and the principles there laid down not extended. The decision conflicted with that of *Eckowri Sing v. Hiralal Seal* (6), and that case appeared to have been overlooked. Where there has been diluviation into a navigable river, the land is lost to the proprietor, and this principle is adopted in similar cases in America, where the rivers are of the same nature; Houk on Navigable Rivers, s. 250.

Sir R. Palmer in reply.

Their LORDSHIPS delivered the following judgment:—

The subject-matter in dispute on this appeal is a portion of chur land thrown up by the Kurnafoolsee, a navigable and tidal river in the district of Chittagong.

The appellants are the representatives of one Anundonarsain Ghose, and, as such, are the zemindars of Turruff Tej Sing, situate on the eastern shore of the river. Their estate appears

(1) 2 W. R., 34.

(2) *Id.*, 127.

(3) 5 W. R., 283.

(4) 4 Moore's L. A., 403

(5) 5 B. L. R., 521; S. C., 13 Moore's L. A., 467.

(6) 2 B. L. R., P. C., 4; S. C., 12 Moore's L. A., 136.

to have been, in 1837, the subject of a careful Government revenue survey, and, as then surveyed and settled, comprehended three mouzahs, named Kalagaon, Chukra, and Lakhera, of which the chittahs or measurement-papers made on the occasion of that survey are set forth in the record.

The respondents, other than the Collector,—so far as it is necessary to notice them—are the co-shares in an estate known as Talook Koreban Ally, and situate on the western shore or bank of the river. That estate was also surveyed and measured in or about the year 1839, and the chittas of one of the village^s included in it, Bakolea, is set forth in the record.

These parties, though made respondents, have not appeared on the appeal, which has been therefore heard against them *ex parte*. Their title however has been fully and ably supported by the learned Counsel for the Government which is in the same interest with them.

From what has been stated, it appears that the estates of the appellants, and these talookdars, whom it will be convenient to call the respondents, speaking of the Government, whenever it is necessary to do so, as the Government, were, as originally measured and settled, bounded and separated by the Kurnasfooleb.

Sometime before 1847, that river threw up in its main and navigable channel certain islands or churs, of which it is only necessary to specify two, *viz.*, Chur Durmeea and Chur Dukhin. A settlement of these was made by Government with the respondents in 1847; the revenue assessed on Chur Dukhin being Rs. 200-6-6. Anundonarain Ghose is said to have presented at least one petition complaining of this proceeding; but, for the purposes of this litigation, it must be assumed that the churs in question were the property of Government, and were duly granted to and settled with the respondents. And it appears from some of the proceedings, that they were treated as appurtenant to Mouzah Bakolea.

Before the end of 1852, the river had swept away the whole of Chur Durmeea, but had formed another low chur in the vicinity of its site. Nor is there now, if there ever was, any question that this, which was known as Lami or Lamchi Chur,

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was settled by Government with the respondents in lieu of Chur Durmesan in December 1852.

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Besides this latter chur, however, the river had before 1854 thrown up a considerable quantity of other chur land towards its eastern shore. This included the land now in dispute, or so much of it as was then above water. The record shows that Government determined to make no claim to this under Act IX of 1847 as an island thrown up in a large and navigable river, but that, having been claimed by several of the proprietors in the neighbourhood, it was, in order to prevent affrays, attached by the Collector until the right of possession should be determined, and thereupon became the subject of a proceeding under Act IV of 1840 before the Magistrate who had to adjudicate on the *prima facie* right to possession between no less than sixteen different claimants. That officer began by directing the darogah to make a local investigation and cause a map to be prepared. The result of this was the darogah's map No. 43, which is in evidence and his report of the record. This map shows four principal churs on the eastern side of the then main channel of the river, A, B, C, and D. Of these A and B are colored green, and represent the land then in dispute. C and D are colored yellow, and are treated as churs not in dispute which had been settled with the respondents. D, their Lordships believe, is admitted to be the Lamchi Chur. Whether C is or is not the Dukhin Chur, or whatever remained of that chur, is still matter of dispute. But it is perfectly clear that it was, in 1854, treated as chur land which had been settled with the respondents and was then in their undisputed possession.

A was divided into several portions, and the result of the Magistrate's proceeding was to award possession of these to different claimants; Grindochunder Ghose and Sreemutty Noberungeny Dossee, who then, as managers or otherwise, represented the estate of Anundonarain Ghose, getting part, and the respondents getting the larger portion lying to the west of the old channel of the river which was adherent to their settled Chur D. It is, however, unnecessary to pursue this part of the case, since the title to no part of A is now in dispute. B was claimed by those who then represented the appellants' estate as a re-form-

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ation on the site of that part of their Mouzah Kalagaon, which had been previously diluviated, or washed away by the river. It was claimed by the respondents as formed by "alluvion on the east of the Dukhin Chur, within the *chuckbund* recorded in their decree of the Appellate Court." The darogah found that Chur B was an accretion to the chur marked C, which had been settled with the respondents. But he also found that it had been formed by alluvion in the place where the lands of Mouzah Kalagaon, belonging to the appellant's zemindary, were formerly broken; and that during the ebb-tide men could walk on foot from the said mouzah to the said chur. The Magistrate's proceeding shows how that officer dealt with the question of possession. He seems to have considered that the disputed churs, being still under water at flood-tide, could not have been effectually in the possession of any of the parties; that claims founded on re-formation upon a site capable of identification could not be tried in any but a regular civil suit, and that the adherence of the land in dispute to lands not in dispute constituted a *prima facie* title by accretion, on which he ought to award possession. He accordingly did award possession of B to the respondents as the holders of the settled Chur C, and left those who represented the estate of Anundonarain Ghose to their remedy by civil suit. The date of this proceeding was the 22nd of December 1854.

The present suit was accordingly brought by Mr. Fagan, who had been appointed Receiver of Anundonarain Ghose's estate by the late Supreme Court of Calcutta. It was not, however, commenced until the 3rd of May 1861, *i. e.*, more than six years after the date of the Magistrate's award. The appellants seek to account for this delay by attributing it to circumstances connected with the administration of Anundonarain's estate. However that may be, it is obvious that the consequences of this delay, in so far as it may have occasioned any difficulty in the determination of the questions between the parties by means of the loss of evidence, or the intermediate changes caused by the action of the river, ought to fall upon the appellants. The suit, as originally brought, was to recover possession of 71 drones of alluvial land; the defendants to it were not the only co-sharers in Talook

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Koreban Ally, but also Horo Lal Mohunt, another of the sixteen claimants before the Magistrate : and the lands appear to have been claimed partly as a re-formation on sites forming part of the wholly or in part, diluviated villages of Mousahs Kalgauon, Chukra, and Lakhera ; and partly as an accretion to such re-formed lands. The Collector, as representing Government, was afterwards made a party to the suit ; Government having an interest adverse to the claim of the appellants, inasmuch as it was entitled to the additional revenue assessable on the lands in dispute, if they were an accretion to the char land of the respondents ; whereas, it was not entitled to any additional revenue upon them, if they were a re-formation on the appellant's lands, and, therefore, included within the limits of his formerly settled zemindary,

The first proceeding in the suit, which it is material to notice is the local inquiry made under the order of the Court, by the ameen Moonshee Ashanoollah. His report bears date the 28th of December 1861 ; and the map accompanying it is No. 7. The report and the map showed, among other things, that of the 71 drones of land claimed, between 8 and 9 drones composed or formed part of a *chuck* marked in the map with the Bengali letter (*kha*) ; and were in the possession of the defendant, Horo Lal Mohunt, though claimed adversely to him in another suit by one Abdool Mujeed. A compromise was afterwards effected between Mr. Fagan, as receiver, and this person, who admitted the appellants' title, and there is no longer any question touching this portion of the land claimed, or with the Mohunt as defendant. The report and map also proved that between 44 and 45 drones, forming other part of the land claimed, composed the *chuck* marked in the map with the Bengali letter " *kh* " (*kha*) ; and that they were held by the defendants, the co-sharers in Talook Koreban Ally on the strength of the Magistrate's award. The son and representative of Abdool Ali, one of these defendants, afterwards made a compromise with the Receiver (admitting the title of the appellants) in respect of his share, which comprised between 4 or 5 drones of the disputed land. It is not easy, if possible, to distinguish these 4 or 5 drones on map No. 7 : but they are indicated on map No. 20, which will be afterwards men-

tioned. The result of this ameen's investigation and his report was altogether in the appellants' favor. He found that all the land in the two *chucks* was a re-formation on sites which, upon local inquiry and measurement, he succeeded in identifying with the *dags* appertaining to the diluviated mouzas of the appellants' zemindary; and in paragraph 5 of this report, he seems to intimated that no part of Chur Dukhin was to be found in the disputed land; and that the latter could not be identified by any *dags* as formed on the site of any part of the respondent's Motizah Bakolea. The last sentence of this paragraph, however, suggests a doubt whether he clearly apprehended the respondent's case; and did not make some confusion between Mouzah Bakolea, as originally settled, and the Chur Dukhin to which, as they alleged, the land in dispute had accreted. This map did not give in detail the *dags* by which the identification of the site was said to have been established.

The suit, at this stage of it, was transferred from the Principal Sudder Ameen to the Zillah Judge, who caused a second local investigation to be made by another ameen named Guggun Chunder Dutt. His report and the map made by him is that numbered 20. This report and map purporting to be founded on local survey, the comparison of *dags*, and the examination of witnesses, go to establish these facts: 1st, that the whole of the chur marked A in that map, being all the land that now remains in dispute, was a re-formation on the site of the appellants' diluviated mouzaha; 2nd, that the chur marked B was a similar re-formation, but comprised the lands in respect of which the compromises with the Mohunt and the heir of Abdool Ali had been effected; and, 3rd, that the Chur Dukhin settled with the respondents in 1847 had then been diluviated, no part of it being included in Chur A, and its site being assumed to be identical with that of a sandy chur in process of re-formation near the western shore of the river. These conclusions were supported by, and in a great measure founded on, the supposed tracing and identification of the *dags* contained in the measurement papers of the appellants' estate as measured and surveyed in 1837. No attempt seems to have been made by this ameen to trace in the disputed land the *dags* of the

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respondents' Mouzah Bakolea, or Kismut Dukhin Chur. His view of the formation of the chur in dispute is thus stated in the 5th paragraph of his report :—"The disputed chur has arisen on the site of the diluviated lands of the plaintiffs at first on the eastern part of the river, and gradually increasing, has accreted on the southern and eastern parts to the plaintiffs' original land. It is not seen that the alluvion began as accretion to the Kismut Dukhin Chur alleged by the defendants to be settled with them."

The suit was after this heard by the Judge, who erroneously dismissed it on the ground that it was barred by limitation. This was set right by a decree of the High Court dated the 22nd of June 1863, which remanded the cause, directing the Judge to inquire and decide whether the whole or any portion of the land claimed was in the possession of the defendants for more than twelve years prior to the suit, and, if not, to try it on its merits and with reference to the provisions of Regulation XI of 1825.

The form of this remand seems to have led to another local investigation by a third ameen named Gour Mohun Biswas, whose report is dated the 10th of March 1865, and whose map is numbered 29. The object of this investigation was to trace, in the dispute land, if possible, land which had been settled with the respondents in 1847, or at all events more than twelve years before the commencement of the suit. The report speaks of Mouzah Bakolea, but their Lordships conceive that the attempt really was to trace the *dags* of Chur Dukhin, which after the settlement and survey of 1847, seems to have been treated as appurtenant to Mouzah Bakolea. This report was altogether adverse to the contention of the respondents. The investigation occupied fourteen days, and its result was to show that the boundaries of the respondents' settled land would fall within the then main channel of the river, and considerably to the west of the disputed chur. This report, therefore, by negating the case of the respondents, went to confirm that made in favor of the appellants, by the reports of the two other ameens.

The cause then came on for a second hearing before the

Judge who tried it on the following issues:—1st, whether the suit was barred by limitation; and, 2ndly, whether the land in suit was a formation on or an accretion to the original site of land in the plaintiffs' estate; or whether it formed a portion of or an accretion to the land settled with the defendants. He found both these issues in favor of the appellants. He seems to have held that the first was determined by the result of the last local investigation, which showed conclusively that the disputed chur contained no part of the land settled with the respondents in 1847. On the second issue he found, in conformity with all the ameen's reports, that the land in suit was clearly a formation on the original site of the plaintiffs' estate and was connected with it, and that the plaintiff was, therefore, entitled to be placed in possession of it.

This decision was reversed, and the suit dismissed on appeal to the High Court, by a decree dated the 1st of December 1865, which, on a re-hearing on review before the same Judges, was confirmed by an order dated the 1st of April 1867. The present appeal is against that decree, and that order on review.

Their Lordships cannot say that either judgment of the High Court affords satisfactory grounds for the dismissal of the appellants' suit.

The first deals only with the latest ameen's report, and explains away the effect of that by assuming that, in making his measurements, he may not have taken a correct starting point. The Zillah Judge, however, in his judgment,* expressly states twice that no objection was taken before him to the ameen's starting point. The investigation was carefully conducted in the presence of the respondents' agents, and it is difficult to suppose that the objection would not have been taken, if there was any foundation for it. Again, the learned Judges of the High Court proceeded on the assumed incompatibility of the case thus made by the appellants with the state of things which existed in 1854 at the date of the Magistrate's proceeding. They came to the conclusion that Ohur Dukhin was the chur marked C in the darogah's map; that the Magistrate had carefully decided against the title set up by the appellants and in favor of the respondents; that the disputed Chur B was

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an accretion to Chur Dakhin; and that the latter had never been diluviated.

But if, for the sake of argument, it be admitted that C in the darogah's map correctly represented what then remained of Chur Dakhin, it would by no means follow that what constituted C in 1854 had not afterwards been washed away, and the conclusion that it still existed as part of the land in dispute seems to be incompatible with the reports of all the ameen's, and notably with that of the last. Moreover, as their Lordships have already observed, the Magistrate by his proceedings seems expressly to have declined to decide on the rights resulting from an identification of site, and merely to have held that the land in dispute, being adherent to C, was *prima facie* to be treated as an accretion to it. Again, the judgments under appeal do not seem to their Lordships effectually to distinguish or deal with the questions raised in the cause.

It undoubtedly lay on the appellants, who were seeking to disturb the respondents' possession of nearly seven years' duration, to show a good title to the land in dispute. They seem to have set up an alternative title, claiming the land either as a re-formation on a site identified with that of their diluviated mouzahs, or as an accretion to their estate by reason of its being a formation opposite to their lands, and only separated from them by a small channel, fordable at low water. This latter was the question chiefly discussed on the review; and if it had been the only ground on which the appellants could recover, their Lordships would have great difficulty in saying that they had made out a good title, or had shown that the Magistrate was wrong in treating the land in question as an accretion to the respondents' settled land represented by C, and in awarding possession of it accordingly. But it seems to their Lordships that, inasmuch as the result of all the local investigations, including that of the darogah, was in favor of the assertion that the land now in dispute was a re-formation upon the site of the appellants' diluviated mouzahs, the Zillah Judge was right in finding that fact to be proved. The question then arises, what is the legal result of such a finding? Is the *prima facie* title to the land thus shown capable

of being displaced by any better title existing in the respondents? According to their Lordships' view of the evidence, no part of Chur Dukhin, at the date of the decree formed part of the disputed land, which may be assumed to be correctly indicated by Chur A, in the map No. 20 of Guggun Chunder ameen. They are, however, not so clear that Chur C, in the darogah's map, did not correctly indicate what remained of Chur Dukhin in 1854. The supposition is no doubt inconsistent with the report of the last-named ameen, confirmed in some measure by the map of a Deputy Collector made in November 1852 (No. 30), which also assigns a different site to the new diluviated Chur Dukhin. On the other hand, it is difficult to see how the award of the Magistrate ever came to be made, if C in the darogah's map did not correctly indicate land settled with the respondents, and then, in their possession. And this latter map is, on that point consistent with the Collector's map, No. 46.

Whilst, therefore, their Lordships think that the appellants have established the identity of the site of the land in dispute with that of lands originally included in their seminary, and afterwards washed away by the river, they will, for the determination of this appeal, take as also proved, that the chur marked C on the darogah's map, though it has since been swept away, existed in 1854 as a chur settled with, and in the possession of, the respondents, and that the land in dispute was then adherent to it. They here advisedly use the term "adherent," because it appears to them that there is an important distinction between mere physical adhesion and that "accretion" or *incrementum latens*, which, by reason of its gradual and imperceptible formation, is recognized by the law as belonging to the persons to whose land it is adjacent. In the present case, the evidence touching the manner in which the chur in question was formed, is extremely scanty; and their Lordships are by no means satisfied that it was such as would make the land an "accretion" according to the strict legal definition of the term.

Their Lordships have now to consider what is the law applicable to the facts thus found, and what are the rights of the

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parties thereunder. And the long and able arguments addressed to them on this subject, render it desirable to review the law of alluvion which obtains in Bengal, as declared by the positive provisions of Regulation XI of 1825; or by the decided cases, which the learned Counsel for the respondents have contended cannot easily, if it all, be reconciled with each other.

The 1st section of the Regulation,—after specifying as the subjects which called for legislation the following cases, *viz.*, 1st the throwing up of churs or small islands in the midst of the stream or near one of its banks; 2ndly, the carrying away of portions of land by an encroachment of the river on one side, and an accession of land at the same time or in subsequent years, gained by the dereliction of the water on the opposite side; and, 3rdly, similar instances of alluvion, encroachment, and dereliction on the sea coast bordering the southern and south-eastern limits of Bengal—enacts that the rules declared by the following sections shall have force of law throughout the presidency of Fort William. The 2nd section provides that local usage, whenever it exists, shall prevail. The 3rd section that, when there is no local usage, the general rules declared in the 4th section shall be applied to the determination of all claims and disputes relative to lands gained by alluvion, or by dereliction either of a river or the sea.

This 4th section is divided into five clauses:—

The first deals with land gained by gradual accession (*i.e.*, alluvion in the proper sense of the word), and provides that it shall be considered an increment to the tenure of the person to whose land or estate it is annexed, subject to the right of Government to assess additional revenue upon it.

The second provides that the former rule shall not be applicable to cases of sudden avulsion, where the identity of the land is not destroyed, preserving in that case the rights of the original owner.

The third makes a chur or island thrown up in a large navigable river (the bed of which is not the property of an individual), or in the sea, the property of the Government, if the channel between it and the shore be not fordable, but provides that

if such channel be fordable at any season of the year, the chur shall be considered an increment by alluvion to the tenure of the person whose estate is most contiguous to it, and shall be subject to the provisions of the first clause.

The 4th clause deals with churs in small rivers, the beds of which have been recognized as the property of individuals ; giving them to the proprietor of the bed of the river. And the 5th clause provides that, " in all cases of claims and disputes respecting lands gained by alluvion, or by dereliction of a river or the sea, which are not specially provided for by the foregoing rules, the Courts, shall be guided by local usage, if any be established as applicable to the case ; and, if not, by general principles of equity and justice."

Two observations arise on this statute :—

1. There is nothing to show that the first rule contemplates land other than that which commonly falls within the definition of " alluvion," viz., land gained by gradual and imperceptible accretion. the *incrementum latens* of the civil law.

2. No express provision is made for the case of land which has been lost to the original proprietor by the encroachment of the sea or a river, and which, after diluviation, reappears on the recession of the sea or river. But, on the other hand, there is nothing to take away or destroy the right of the original proprietor in such a case ; which must therefore be determined by " the general principles of equity or justice " under the 5th rule.

That the right of the proprietor in the case last put exists and is recognized by law in India, is established by at least two cases decided at this Board, and therefore binding on their Lordships, viz., the case of *Mussamat Imam Bandi v. Hargarind Ghose* (1) and the recent case of *Lopez v. Madanmohan Thakur* (2), decided on the 11th July 1870.

The former is a clear authority that the identity of the site may be established by maps and ancient documents ; although by the long submergence of the land, all external marks and

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(1) 2 B. R., L. P. C., 4 ; S. C., 4 Moore's I. A., 403.

(2) 5 B. L. R., 521 ; S. C., 13 Moore's I. A., 467.

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means of identification have been obliterated. It is not, however, very clear in that case whether the question between the parties was one of boundaries of the original estates ; or of dispute between one party claiming the land as a re-formation on his original land, and the other claiming it as an accretion under the first cl. of the 4th section of the Regulation. The latter, however, was clearly the issue between the parties in the case of *Lopez v. Madanmohan Thakur* (1). It may, however, be said that that case is distinguishable from the present by its peculiar circumstances, inasmuch as in the former the encroachment of the river had in the first instance swept away the surface of the plaintiffs' mouzah, and made the defendant, who held lands behind those so swept away, for the first time a riparian proprietor ; and because the plaintiff had, by the preparation of the *tanabundee* map and otherwise, taken peculiar precautions to preserve and protect his right in the soil against his neighbour as well as the Government.

It was, moreover, contended that some at least of the principles laid down in the case of *Lopez v. Madanmohan Thakur* (1) are in conflict with the previous decision of this Board in the case of *Eckowri Sing v. Hiralal Seal* (2). That case had not been reported when that of *Lopez v. Madanmohan Thakur* (1) was decided, and does not appear to have been cited in the argument. Their Lordships cannot, however, perceive any inconsistency between the two judgments. The decision in the case of *Eckowri Sing v. Hiralal Seal* (2) seems to have proceeded on two grounds, namely, 1st, that it was not competent to the plaintiffs, who had alleged a title to the land as an accretion to their estate, to raise at the hearing of their appeal a different case, viz., "one" simply of original ownership of the site of the lands re-formed ; and, 2ndly, that, had such a title been properly pleaded, the evidence failed to establish the identification of the site. The case of *Mussamat Imam Bandi v. Hargabind Ghose* (3) is cited in the judgment, which throws no doubt upon the validity of such a title if properly pleaded and proved.

(1) 5 B. L. R., 521 ; S. U., 13 Moore's I. A., 467.

(2) 12 Moore's I. A., 36.

(3) 2 B. L. R., P. C., 4 ; S. C., Moore's I. A., 403.

Again, the learned Counsel for the respondents, and, in particular, Mr. Pontifex, argued broadly that, by diluviation into a navigable river, land is permanently lost to the original proprietor, and becomes the property of the State; and in support of this proposition, they relied much on an American work, "Houk on Navigable Rivers," which they argued was the more deserving of attention, by reason of the similarity which exists between the great rivers of America and those of India in their conditions and mode of action. This authority, however, does not appear to their Lordships to assist the respondents' case. The law of alluvion in America seems to be less favorable to riparian proprietors than that of India or of England. For Mr. Houk draws a distinction between estates consisting of a given quantity of land, and defined by a mathematical line, though by one on the margin of a river, and those of which the river is the nominal boundary. He holds that in the former case, alluvion however small, and however gradually and imperceptibly formed, is the property of the State. And after dealing with this question, he says in s. 258:—"Nevertheless, it is possible that, by the action of the sea, or a change of the channel of a river, the land so granted may be partly lost. No doubt in case afterwards the land should be washed up again, it would belong to the former owner of the estate originally purchased, and no further. While, however, the land is submerged in the river, the title is in the State." This is consistent with the civil law, Dig. Lib. XLI, tit. I, s. XXX, and with the law of England as declared in the passage cited in the case of *Lopez v. Madanmohan Thakur* (1) from Hale "De Jure Maris."

In India the point thus taken seems to be concluded by the authority of the decided cases. The learned Counsel did not contend for a distinction between a tidal river and a navigable river, which has ceased to be tidal. Their Lordships have no reason to suppose that, in India, there is any such distinction as regards the proprietorship of the bed of the river though in respect of the mode of accretion, there must be some difference between the effects produced by the daily flux and

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(1) 5 B. L. R., 521; S C., 13 Moore's I. A., 467.

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reflux of the tide, and the changes which are mainly consequent on the annual floods. Now, if there is no such distinction, it is clear that the Ganges at Bhagulpore, as in the case of *Lopez v. Madanmohan Thakur* (1), and at Patna, as in the case of *Mussamat. Imam Bandi v. Hargavind Ghose* (2), is a navigable, though no longer a tidal river; and, consequently, that these cases are direct authorities against Mr. Pontifex's proposition. Their Lordships accede to what is said in the case of *Lopez v. Madanmohan Thakur* (1), to the effect that a proprietor may, in certain cases, be taken to have abandoned his rights in the diluviated soil. It is unnecessary to consider whether this might not be the result of a successful application for remission of revenue under Act IX of 1847, s. 5. For in the present case, there is nothing from which such abandonment can be inferred. If an application for remission of revenue was made, that application was refused.

The appellants having then established a *prima facie* title to the land in dispute as a re-formation, the question is whether the respondents have a superior title to it as an accretion to their settled chur. It is not easy to see upon what principle a title to alluvion by gradual accretion should prevail against the original ownership established by identification of site; unless it be that, where the accretion is so gradual as to be latent and imperceptible during its progress, the law, on grounds of convenience, presumes incontrovertibly that no other ownership can be shown to exist, and so bars inquiry.

In the present case it appears to their Lordships that such a gradual and imperceptible accretion as the law contemplates is not proved, and that there are peculiar reasons why the title of the plaintiffs should be preferred to that of the defendants. The latter do not claim the land as an accretion to their original estate. They claim it as an accretion to the chur cast up by the river, and settled with them by Government. Let it be granted that the first effect of the retrocession of the river was to leave bare this chur in the midst of the stream, and that the land then cast up was beyond the confines of the plaintiffs' estate. The

(1) 5 B. L. R., 521; S. C., 13 Moore's I. A., 437.

(2) 2 B. L. R., P. C., 4; S. C., 4 Moore's I. A., 403.

river continues to recede, more land appears, and new land, though adherent to that first discovered, is really a deposit on the ancient site of the plaintiffs' land. Why should the ownership of that which is thus regained be altered by the fact that, from some accidental cause, land forming the outer edge of it first emerged as an island? The darogah's map seems to show that this must have been the course of the river's action. Nor, as their Lordships have already observed, is there any trustworthy evidence which traces the history of the disputed land, or shows that, by gradual and imperceptible accretion, it became adherent to the chur, which upon the whole evidence must be taken to have now ceased to exist. Such a case as the present is very distinguishable from the ordinary case contemplated by the Regulation in which a river, gradually shifting its channel in one direction, continually eats into one bank, and leaves the other, never ceasing to flow between the competing estates.

Their Lordships are not insensible to the difficulties of identification, and to the danger of encouraging claims of this kind on insufficient evidence. They lay down no rule as to the strictness of proof which the Courts in India may require in such cases.

They also consider that a title founded on the original ownership and identification of site is to be confined *primâ face* to the re-formation on that site. And if, in the present case, it had appeared that some part of the land in dispute had been thrown up beyond the original boundaries of the appellants' estate, a question might fairly have arisen between the appellants and the respondents whether that was to be taken to be an accretion to the estate of the former, or to the settled chur of the latter. But upon the evidence they are satisfied that the whole of the land which continues to be the subject of the suit is a re-formation within the limits of the appellants' original estate. This being so, their Lordships are of opinion that the Zillah Judge was right in decreeing the whole to the appellants. And they will humbly advise Her Majesty to allow the appeal; to reverse the decree of the High Court; and to order that, in lieu thereof, a decree be made dismissing the appeal to that Court, and affirming the decree of the Zillah Judge. The appellants must have from the respondents, the plaintiffs in the suit, the costs of the

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litigation in India, and those of this appeal. There will be no order as to the costs of Government on this appeal.

Appeal allowed.

Agents for appellants: Messrs. *Wilson, Bristows and Carpmael.*

Agents for the Government respondents: Messrs. *Lawford and Waterhouse.*

FULL BENCH.

Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Bayley, Mr. Justice Kemp, Mr. Justice Mitter, and Mr. Justice Ainslie.

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IN THE MATTER OF THE PETITION OF BYKUNTRAM SHAHA ROY
 AND OTHERS.*

*Code of Criminal Procedure (Act XXV of 1861), s. 62—Rival Hats—
 Power of Magistrate—Riot—Affray.*

A Magistrate has power, under s. 62 of Act XXV of 1861 (1), to prohibit a particular landholder from holding a *hâit* on a particular spot on a particular day, at least for a temporary period, if he is satisfied upon reasonable grounds that the order is likely to prevent, or tends to prevent, a riot or an affray.

THIS case arose out of a dispute between two neighbouring zemindars, Bykuntram Shaha, one of the petitioners, and one

(1) *Act XXV of 1861, s. 62.*—"It shall be lawful for any Magistrate by a written order to direct any person to abstain from a certain act, or to take certain order with certain property in his possession, or under his management, whenever such Magistrate shall consider that such direction is likely to prevent, or tends to prevent, obstruction, annoyance, or injury, or risk of obstruction, annoyance, or injury, to any persons lawfully employed, or is likely to prevent, or tends to prevent, danger to human life, health, or safety, or is likely to prevent, or tends to prevent, a riot or an affray."

Act IX of 1872, s. 518.—"A Magistrate of the district, or a Magistrate of a division of a district, or any Magistrate specially empowered, may, by a written order, direct any person to abstain from a certain act, or to take certain order with certain property in his possession or under his management, whenever such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance, or injury or risk of obstruction, annoyance, or injury to any persons lawfully employed, or danger to human life, health, or safety, or a riot or an affray."

* Reference to the High Court under s. 434 of the Code of Criminal Procedure.

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Bipin Behary. The petitioner Bykuntram, with a view to annoy the respondent it was said, established a new *hàt* (market) close to an old established *hàt* belonging to Bipin Behary. This was said to have caused unlawful assemblies to take place, and to have raised an apprehension of a breach of the peace. On the 8th of November 1871, both the parties, with some of their followers, were bound over in the sum of Rs. 200 to keep the peace for one year. On the 3rd of May 1872, the Magistrate, apprehending that the amount of the recognizance was not sufficient, summoned the parties, and caused Bykuntram and Bipin Behary to enter into recognizances of Rs. 3,000 each, with two sureties in Rs. 1,000 each, to keep the peace for one year from that date. The Magistrate also took smaller recognizances from the servants of both parties, and made an order under s. 62 of the Code of Criminal Procedure that Bykuntram was not to hold his market at the same time as Bipin Behary did. At the instance of the parties affected, the Officiating Sessions Judge of Dacca made a reference to the High Court under s. 434 of the Code of Criminal Procedure, recommending that the order in question be set aside. There was also an order under s. 404 made by the High Court on the motion of Madhub Chunder Roy, one of the parties concerned, calling up the record of the case,

The case was argued before Kemp and Glover, JJ., who, in consequence of conflicting decisions in *Sibchunder Bhutta-charjee v. Sadut Ali Khan* (1) and *The Queen v. Kalika Pershad* (2), referred the following question to a Full Bench:—

“Whether a Magistrate is legally competent to issue an order under s. 62 Act XXV of 1861, prohibiting a landholder from holding a *hàt* on any particular spot on his estate on particular days, on the ground that such order is likely to prevent a riot or affray, or because a riot or affray has already occurred.”

Mr. Woodroffe (with him Baboos Mohinimohan Roy and Romesh Chunder Mitter), in support of the Magistrate's order.

The Advocate-General, offg. (Mr. Paul) (with him Baboos Kalimohan Doss, Doorgamohan Doss, and Kalikanth Sein, for the petitioners.

(1) 4 W. R., Cr., 12.

(2) 5 B. L. R., App., 82 (note).

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Mr. Woodroffe.—It is a question whether there can be a reference to this Court in this matter; in other words can this Court under s. 434 of Act XXV of 1861 deal with a matter under s. 62 which is not a judicial proceeding. [The Advocate-General.—This point is not referred to the Full Bench. KEMP, J.—The point was not before us.] It is open to the parties now to raise the question whether the Court has the power to hear and determine the question referred. [COUCH, C. J.—Have you any authority for that proposition? (1) I think that matters not referred cannot be decided.] Whether the parties are entitled to raise the point or not, Counsel out of courtesy are heard upon points which may seem to them worthy of consideration. [COUCH, C. J.—I think you must be limited.] In *The Queen v. Abbas Ali Chowdhry* (2), it was decided that a matter under s. 62 is not a judicial proceeding, and therefore could not be interfered with under s. 434. It is there said the object of s. 62 was to provide for cases where it would be necessary to act speedily, probably at once, in order that the danger might be prevented. [KEMP, J.—This is not only a reference by the Officiating Sessions Judge, but we sent for the record.] From the language of s. 62, it is clear that the Legislature intended to give Magistrates power to place restrictions like the one in question upon the enjoyment of a right even where nothing unlawful is done, but where the exercise of that right may lead to mischief, or cause inconvenience to others. The intention of the Legislature could hardly have been to deal with an unlawful exercise or enjoyment of a right only, as unlawful acts could be put down by the Magistrate without a special legislation like s. 62. So, where a man does even a lawful act, but with an intention of annoying others, the Magistrate may interfere so as to prevent mischief. The words “to take order with his property” clearly show that the Magistrate may pass an order regulating the exercise of one’s personal and private rights. A comparison of this section with other provisions of the law will make its meaning clear; s. 63, for in-

(1) See *The Queen v. Gorachand Gope*, (2) 6 B. L. R., 74.
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stance, speaks of unlawful obstructions ; but s. 62 does not speak of any thing unlawful. The Magistrate may interfere whether the act be lawful or unlawful. I rely upon the decision in the case of *The Queen v. Kalika Pershad* (1) in support of my argument.

Baboo Mohinimohun Roy followed on the same side.

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The Advocate-General.—There is a wide distinction between an injury in the legal sense and a mere loss or inconvenience to others. The former can be repressed because it involves a violation of some body's rights. The latter is not actionable because it does not infringe any body's right. If a rival *hāt* may be repressed because it causes inconvenience to others, a rival shop or business of any kind may be put down in an absolute manner on the same ground. The true meaning of the section therefore is that there must be an unlawful act. [Couch, C.J.—Is there any authority for that?] Annoyance to others is not by itself a sufficient ground for stopping a lawful act, otherwise a man may be told not to have music at his house if it caused annoyance to his neighbours. Act XXV of 1861 is simply a code of procedure. It does not profess to deal with rights of property—it provides remedies against wrongs known to the law. A substantive law may cut down the rights of persons, or qualify the mode of enjoying the same, but this law does not do so. The closing of one of the *hāts* is not the only way of preventing the mischief, if mischief there be. The offenders can be apprehended and punished. The action of the Magistrate in this case is an interference with the rights of private property. The Magistrate might as well, according to his own views and discretion, put down an old *hāt*. He may be of opinion that the new *hāt* is more advantageous to the neighbourhood ; and, if his action is not limited to wrongful acts, he might as well stop an old *hāt* in favor of a new one. The Code gives him ample powers to deal with a case of this description in a lawful manner instead of resorting to an arbitrary measure, which, not being a judicial act, will leave the party affected without the remedy of revision by this Court. It may be said

(1) 5 B. L. R., App., 82 (note.)

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that there is a remedy by personal action against a Magistrate for an arbitrary act; it is, however, submitted that the powers of supervision vested in the High Court are wide enough to afford an aggrieved party relief without driving him to an action. The natives of this country are most unwilling to bring actions against the authorities, and the remedy by action, though open to them, is one which is for these reasons impracticable. The ruling in *Sibchunder Bhattacharjee v. Sadut Ali Khan* (1) is correct and should be followed.

The opinion of the Full Bench was delivered by

COUCH, C.J.—The question referred to the Full Bench is (*reads*).

We are of opinion that this question ought to be answered in the affirmative. S. 62 of Act XXV of 1861 runs as follows (*reads*). The above provisions clearly show that it is lawful for a Magistrate to issue a written order to any person directing him to abstain from any particular act, or to hold any property in his possession or under his management subject to any particular condition if such Magistrate shall be satisfied that such direction is likely to prevent a riot or an affray. The word "certain" placed before the word act, and afterwards repeated twice in the expression, "to take certain order with certain property in his possession," leaves no reasonable doubt in our minds that the Legislature intended to give full and ample powers to the Magistrate, the chief officer entrusted with the duty of preserving the peace of the district, to restrain any person from doing any act, or to command him to hold any property in his possession subject to any condition, whenever such Magistrate shall consider that such a course of procedure is likely to prevent, or even tends to prevent, a riot or an affray. No doubt, the powers conferred upon the Magistrate by this section ought, like all other powers of discretion created by law, to be exercised in a reasonable manner, and it may further be admitted that the Magistrate is bound, before he issues the order, to satisfy himself upon reasonable grounds that that order is likely

(1) 4 W. R., Cr.; 12.

to prevent, or tends to prevent, a riot or an affray. But if a Magistrate, after exercising the necessary discretion, issues an order directing a particular landholder not to hold a *hât* on a particular spot on a particular day, up on the ground that the holding of the *hât* at that particular place and time by that particular individual is likely to lead to a serious breach of the peace, we cannot, upon a proper construction of s. 62, say that the order is null and void for want of jurisdiction or power. The law gives a very wide discretion to the Magistrate in matters affecting the public tranquillity, and it is not for us to curtail that discretion by construing the Act in a manner contrary to the plain and obvious meaning of the words in which it is expressed.

It has been argued that the powers vested in the Magistrate by s. 62 must be confined to those acts and modes of enjoyment of property only which are in themselves unlawful ; and that, as there is nothing inherently illegal in a man holding a *hât* on his own land on any particular day he chooses, the order passed by the Magistrate in this case must be set aside as void for want of power. But not only is this restricted construction not supported by the actual words of the section, but its adoption might in many cases lead to the most dangerous consequences. A particular act or a particular mode of enjoyment of property might be perfectly innocent and lawful in itself. But the act may be done, or the property enjoyed, in that particular mode under circumstances calculated to lead to a serious breach of the peace, attended even with loss of human life ; and it would be by no means proper or desirable to hold that even in such cases the chief peace officer of the district has no power to issue an order such as that contemplated by s. 62.

Whether a zemindar is in all cases entitled to establish a *hât* on his own land, but in close proximity to a previously established *hât* belonging to another zemindar, is a question upon which we need not express any opinion. Nor is it necessary for us to determine the question whether the Magistrate has in this particular case exercised his discretion in a proper manner, or whether his order as it stands requires any amendment either as to the duration of the injunction or otherwise :

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for these questions have not been referred to us by the Division Bench, Assuming however that there is nothing unlawful in zemindar holding a *hat* on his own land on any day he chooses and assuming also that the mere fact of his holding a *hat* on such a spot and on such a day, would not be sufficient to warrant a Magistrate in coming to the conclusion that a breach of the peace is likely to take place, it seems to us clear that there may be other circumstances connected with the holding of the *hat* at that particular place and time which would fully justify a Magistrate in issuing an order under s. 62, at least for a limited period of time, if the Magistrate is satisfied, after a reasonable exercise of the discretion vested in him by that section, that such an order is necessary for the preservation of the public peace.

It is stated in one of the cases mentioned in the order of reference that a Magistrate has no power under s. 62 to issue an order that would interfere with any one's right to enjoy his own property in any lawful manner he pleases. Whether a Magistrate can under that section, issue such an order as would be utterly destructive of a man's right of property is not a question which we are called upon, in this case, to determine one way or the other. It is sufficient for us, for the purposes of this reference, to say that it is quite within the power of the Magistrate under s. 62 to modify the enjoyment of such rights, at least for a temporary period, by imposing upon the owner of the property such conditions as the Magistrate, after taking into consideration all the facts and surrounding circumstances of each particular case, shall consider necessary to prevent a riot or an affray. Every individual right is, to a certain extent, subject to the general interests of society; and after giving our best consideration to the question referred to us, we feel ourselves bound to come to the conclusion that the Legislature has purposely vested the Magistrate with powers sufficient to cover a case like the one mentioned in the order of reference. It is notorious that in this country, rival *hats* are frequent sources of riot and affray; and there is something in the nature of such *hats*, namely, the assemblage of large crowds of men on both sides, which may be said to have a certain tendency to lead to a breach of the peace. We do not mean to say that such general

facts alone are sufficient to justify the exercise of the discretion vested in the Magistrate by s. 62. But we think that there may be other circumstances connected with those general facts, as for instance, the existence of bitter hostility between the owners of the rival *hats*, the preparations already made by them for the commission of a breach of the peace, &c., which might render it absolutely necessary to exercise that discretion for the preservation of public tranquillity.

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IN THE
MATTER OF
THE PETITION
OF BYKUNT-
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ROY.

APPELLATE CIVIL.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Birch.

IN THE MATTER OF THE PETITION OF KASHICHUNDER DOSS.*

Criminal Procedure Code (Act XXV of 1861), ss. 62, 282 (1) Power of Magistrate—Breach of the Peace—Wrangling Act,

1873
March 19.

Under s. 282 of Act XXV of 1861, a Magistrate can prevent a person from doing a wrongful act, but not one which the person may lawfully do. It was not intended that a person should be prevented by a Magistrate from exercising his rights of property, because another person would be likely to commit a Breach of the peace if he did so.

ONE Hurkishore Doss complained to the Magistrate of Tipperah that Kashichunder Doss, the petitioner, was laying the

(1) *Act XXV of 1861, s. 282.*—"It shall be lawful for the Magistrate of the district or other officer exercising the powers of a Magistrate whenever he shall receive credible information that any person, whether a European British subject or not, is likely to commit a breach of the peace, or to do any act that may probably occasion a breach of the peace, to summon such person, to attend at a time and place mentioned in the summons; to show cause why he should not be required to enter into a bond to keep the peace with or without sureties, as the Magistrate shall think fit."

Act X of 1872, s. 491.—"Whenever a Magistrate of a division of a district, or a Magistrate of the first class receives information that any person is likely to commit a breach of the peace, or to do any act which may probably occasion a breach of the peace, he may summon such person, to attend at a time and place mentioned in the summons, to show cause why he should not be required to enter into a bond to keep the peace with or without sureties as such Magistrate may think fit."

* Miscellaneous Case No. 4 of 1873 from Tipperah.

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foundation of a building, the drippings from the roof of which, if allowed to be completed, would fall on the thatch of his house, and that his hedge would be injured by reason of the ground being dug quite close to it, and asked the Magistrate to issue an injunction under s. 62 of the Code of Criminal Procedure to prevent the said building from being raised, and to take recognizances from Kashichunder Doss under s. 282 to keep the peace. The petition of Hurkishore Doss was not on the record; and the purport of it was imperfectly stated in Kashichunder's petition to the High Court. It appeared that the case was made over to the Deputy Magistrate, who called on Kashichunder to show cause why he should not give a recognizance for Rs. 500 under s. 282 to keep the peace. He found upon the evidence that there was a likelihood of a breach of the peace because the digging had been carried up to the boundary line between the lands belonging to the parties respectively, and that the building if allowed to be raised, would encroach upon the complainant's land, and that the drippings would fall on his house. He found also that there had been a long standing dispute ("for generations") between the parties in regard to the boundary line between their respective lands, and accordingly ordered that the petitioner enter into a recognizance for Rs. 500 to keep the peace for one year.

On appeal the Judge declined to interfere.

Kashichunder Doss then petitioned the High Court under s. 404 of Act XXV of 1861

Baboo Doorga Mohun Doss for the petitioner.—The Magistrate's action in this case amounts to an interference with a man's right of private property. There must be an unlawful or wrongful act by a person to justify the interference of a Magistrate. If the act done by the party be in itself a lawful act, it is no ground of interference that its exercise may probably lead to a breach of the peace in respect to such act. There must be an invasion of somebody's right or something that is in itself wrong before the Magistrate can require recognizances. From the evidences in the case, and the finding of the Magistrate, it was a wrong party that was bound over, because all that the Magis-

trate finds upon the evidence is that, if the petitioner does not refrain from proceeding with the building at the request of the respondents, there may be a breach of the peace, obviously on the respondent's side.

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DOSS.

Baboo *Ohunder Madhub Ghose* contra.—There is no distinction in principle between the action of a Magistrate under s. 62 and that under s. 282 of Act XXV of 1861. The Magistrate has the discretion to make an order, the object of which is to prevent a breach of the peace, even though it may put some restriction on the enjoyment of property—*In the matter of the Petition of Bykuntram Shaha Roy* (1). Under s. 62 it has been held by a Full Bench of this Court in *The Queen v. Abbas Ali Chowdhry* (2) that, if a Magistrate should stop one of two rival *hats*, this Court has not the power to review his order. The same principle is applicable here, the Magistrate having found that there had been a long standing dispute between the parties, and that there was a likelihood of a breach of the peace, as the new building would be an encroachment on the complainant's land and would prove a constant source of annoyance to him.

The judgment of the Court was delivered by

COUCH, C.J.—The petitioner, Kashichunder Doss, was required to enter into a bond in the sum of Rs. 500 to keep the peace for the period of one year at the instance of Hurkishore Doss. It appears that the premises of the two adjoin. Kashichunder wishes to build a side-wall of a building upon his own ground, and Hurkishore objects to his so doing, because he anticipates that the dripping from the roof of the building, when completed, will fall on the thatch of his house. It is not alleged that Kashichunder is encroaching on Hurkishore's land. The Deputy Magistrate appears to think that the raising of the wall by Kashichunder may occasion a breach of the peace, but if such a breach of the peace were probable, Hurkishore would be the party to blame and the wrong-doer, as he is not authorized to interfere with Kashichunder's lawful use of

(1) *Ante*, p. 434.

(2) 6 B. L. R., 74.

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Doss.

his own property. It is true that s. 282 of Act XXV of 1861 in vests magisterial officers with large powers of interference in any matter where a breach of the peace is considered by them likely to occur, but great discretion is required in the exercise of those powers.

The effect of the Deputy Magistrate's order is to prevent Kashichunder from building this wall at all, for, if, after the termination of the year, Kashichunder attempts to raise the wall, his neighbour will represent his so doing as an act that may probably occasion a breach of the peace, and will obtain a fresh order for security. To avoid such a consequence as this, we must construe the words "or to do any act that may probably occasion a breach of the peace" as meaning a wrongful act and not one which the person may lawfully do. It was not intended that a person should be prevented by a Magistrate from exercising his rights of property, because another person would be likely to commit a breach of the peace if he did so. We think that the order of the Deputy Magistrate should be quashed, and the bond be cancelled.

Order quashed.

ORIGINAL CIVIL.

Before Mr. Justice Macpherson.

1873
April 17.

THE NAWAB NAZIM OF BENGAL v. HEERALALL SEAL.

Attorney's Costs—Lien on Sum recovered by Client—Attachment of Fund by Creditor.

The plaintiff obtained a decree against the defendant; but before satisfaction of the decree, the amount of decree was attached in the hands of the defendant by a third person who had obtained a decree in a suit against the plaintiff. On an application by the Attorney for the plaintiff that the defendant might be ordered to pay to him his costs of suit out of the sum which had been attached in the defendant's hands, and on which the attorney claimed to have a lien, the Court held that the attorney had a lien for his costs on the sum so attached, but that the only order it could make was an order to the defendant not to pay the sum attached to any one without notice to the attorney.

This was an application by Mr. Pearson, the present attorney for the plaintiff in the suit No. 9 of 1869, on notice to Heera-

lall Seal and Roy Lutchmeeput Singh, for an order that an attachment issued by Roy Lutchmeeput Singh, by which he had attached the amount of the plaintiff's decree in the suit, might be varied, and that Heeralall Seal might be ordered to pay to Mr. Pearson, as attorney for the plaintiff, the costs of this suit, including the costs of this application, and attendant thereon, when taxed as between attorney and client, "taking credit for so much thereof as the said Heeralall Seal is not ordered to pay to the Nawab Nazim, and also taking credit for the costs ordered to be paid by the said Nawab Nazim to the said Heeralall Seal as against the decree passed herein." Mr. Pearson was the third attorney in the suit; Mr. Leslie was originally the attorney on the record; he retired from the suit, and his place was supplied by Mr. Linton whom Mr. Pearson succeeded.

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The affidavit of Mr. Pearson, filed in support of the application, stated as follows:—"That Mr. S. J. Leslie was the constituted attorney in the suit, and that he claimed the whole amount of costs due to him under a decree in the suit; that a large sum was due to himself as attorney for the plaintiff in the suit, and he had agreed to pay the costs of the former attorneys for the plaintiff, Mr. Leslie and Mr. Linton, in the suit, when he received them, on their consenting to a change of attorney, and that he had consented at Mr. Linton's request to tax his bill of costs with his (Mr. Pearson's) and to receive the money for him on account of costs; that neither he nor Mr. Linton had received anything on account of such costs; that by the final decree in the suit dated 14th January 1873, there was due to the plaintiff Rs. 12,449-4-10; that by an order dated 25th November 1872 in a suit brought by Roy Lutchmeeput Singh against the Nawab Nazim, the sum due to the plaintiff was attached by Roy Lutchmeeput Singh; that the attachment was in the usual form restraining the Nawab Nazim from receiving from Heeralall Seal the amount payable under the decree in the suit 9 of 1869, and restraining Heeralall Seal until the further order of the Court from making payment of the said money or any part thereof to any person whomsoever; that he was desirous of obtaining an order for the payment of his own costs and the costs due to Mr. Linton and Mr. Leslie by the Nawab Nazim out of the moneys payable

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to him by the defendant Heeralall Seal, and he submitted that the said sum of Rs. 12,440-4-10 due under the decree in the suit was subject to the payment of such costs.

Mr. Branson, in support of the application, contended that an attorney had a lien for his bill of costs on the sum recovered by his client, and cited *Welsh v. Hole* (1), *Townsend v. Beade* (2), *Irving v. Viana* (3), *Eisdell v. Ooningham* (4), and *Ex parte Cleland, In re Davies* (5).

Mr. Piffard for Heeralall Seal.—The order at any rate ought not to be made as asked. The lien if there is any cannot have priority over all other claims.

Mr. Phillips for the attaching creditor.—Though an attorney has a right to his costs before a client is entitled to the fund, no case decides that the attorney has a right which the client could not have had. The only question is between the attorney and the client. *Welsh v. Hole* (1) only decides that the Court will prevent the money from being paid over to the client. Here the sum is not realized. If the parties compromise, the attorney cannot have a separate interest. The case of *Irving v. Viana* (8) is against the attorney's contention. The order at any rate ought to be confined to Mr. Pearson's costs; there is no question as between him and the two previous attorneys. The attorney is not to be deprived of his lien by his client, but that will not prevent other claimants from attaching the fund on which he claims a lien. The attachment of a judgment-debt under the Garnishee clauses of the Common Law Procedure Act 1854, overrides the attorney's lien—*Hough v. Edwards* (6), *Lloyd v. Mansell* (7) and *Barker v. St. Quintin* (8), per Lord Mansfield. Cases that do not proceed on the Garnishee clauses of the common Law Procedure Act 1854, are not applicable.

(1) 1 Doug., 238.

(2) 4 L. J., Oh., 233.

(3) 2 Y. & J. 70.

(4) 28 L. J., Exch., 213,

(5) L. R., 2 Ch. App., 808.

(6) 2 Jur., N. S., 814; S. C., 26 L. J., Exch., 54.

(7) 22 L. J., Q. B., 110.

(8) 12 M. & W., 451.

Mr. *Brunson* in reply.—*Hough v. Edwards* (1) is in our favor. The attorney and the attaching creditor both have a lien, but inasmuch as but for the attorney, there would be no fund to get their claim out of, the attorney has a paramount claim.

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HEERALALL
SEAL.

The judgment of the Court was delivered by

MACPHERSON, J. (after stating the facts).—The lien relied upon is simply a lien upon the fund recovered in the suit No. 9 of 1869 for the costs of the attorney incurred in that suit. Such a lien is wholly different from a lien on the papers (whether connected with the suit or not) of the client, and it in no degree depends upon the attorney being or having been in possession of the papers of the suit or other documents belonging to his client—see *Bozon v. Bolland* (2).

I think there is no doubt that Mr. Pearson has a lien for his costs of this particular suit, which must eventually prevail against the attachment issued by Roy Lutchmepoot Singh (see *Hough v. Edwards* (1) and *Eisdell v. Coningham* (3), and the cases collected in Daniell's Chancery Practice, 4th Ed., pp. 1698, 1699.) And I further think that the fund recovered is also subject to a lien for the earlier costs of Mr. Linton and of Mr. Leslie, though Mr. Pearson's lien for his own costs would (apart from any agreement on the subject) take precedence of theirs.

But it appears to me that the application which Mr. Pearson makes is in its form misconceived. This fund is attached in the hands of Heeralall Seal by an order directing him to pay it to no one except under a further order of Court. He cannot pay it to Roy Lutchmepoot Singh more than to any one else, and Roy Lutchmepoot Singh has no means of reaching the fund save by obtaining a further order of Court authorising (but not directing) Heeralall Seal to pay the fund to him, or by applying to have a Receiver appointed to get in and realize the amount due. Heeralall Seal, being the party to pay the money, would, after notice of the attorney's lien, pay the money at his own peril if he did not first satisfy the lien. And if the fund were brought

(1) 2 Jur., N. S., 814.

(2) 4 M. & C., 354.

(3) 28 L. J., Exch., 212.

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into Court, the attorney might present a petition for taxation of his bill and for payment of it out of the fund. Under these circumstances I can make no such order as is asked for now. The decree directs that the defendant Heeralall Seal shall pay to the plaintiff the Nawab Nazim a certain sum. How can the plaintiff now come in and ask that the decree shall be as it were split up into parts, and that as to part an order may be made that it shall be paid to the plaintiff's attorneys?

All I can do at present is to order that Heeralall Seal do not pay the fund attached to any body without giving due notice to Mr. Pearson, to Mr. Linton, and to Mr. Leslie. The sooner those gentlemen tax their bills and ascertain their true position, the better will it be for them.

There will be no costs of this motion.

Application refused without costs.

Attorney for the plaintiff : Mr. Pearson.

Attorneys for the attaching creditor : Messrs. Beebe and Rutter.

Attorney for the defendant : Mr. Wigley.

Before Sir Richard Oouch, Kt., Chief Justice, and Mr. Justice Pontifax.

KALLYPERSAUD, SING v. HOOLAS CHUND.

1873
 April. 29.

Small Cause Court Act (IX of 1850), ss. 58, 88—Jurisdiction—Goods and Chattels—Moveable Property—Tiled Huts.

See also
 14 B L R 202

Tiled huts are not "goods and chattels" within the meaning of s. 58, Act IX 1850, and therefore cannot be taken in execution under that section.

Where tiled huts had been seized under a decree of the Small Cause Court, and a third party interpleaded under s. 88 of Act IX of 1850, and claimed the huts, held that the Court, having no power to seize the huts, was right in dismissing the claim.

CASE stated for the opinion of the High Court by the first Judge of the Calcutta Small Cause Court, under s. 7 of Act XXVI of 1864 :—

"The plaintiff interpleaded under s. 88 of Act IX of 1850 for two tiled huts, valued at Rs. 1,000, which had been seized by the defendant (judgment-creditor in a previous suit,) and which the plaintiff claimed as goods and chattels belonging to himself. The huts were proved to be of the following construction :—The posts are very large, made of small (*sic.*) wood, the ceiling is made of planks covered with mortar and chunam, the floor of the second story of mortar like houses, and the walls of split bamboos and gurran posts covered with mud ; there are wooden steps nailed on to the pillars, the ground floor is made of bricks covered with tiles.

I held that these huts were not moveable without change of form, and that they were clearly not moveable property, under the Act for the Regulation of Mofussil Small Cause Courts and the Full Bench decision *Nattu Miah v. Nand Rani*" (1).

The first Judge, after referring to the words of the Mofussil Small Cause Court Act (XI of 1865) and Stephen's Commentaries, Vol. I, 286 and 172, held that the huts claimed were not goods and chattels, and were consequently not the proper subject of a claim under s. 88 of Act IX of 1850, but should be made the subject of an action of trespass for a seizure not justifiable under the terms of the warrant. He dismissed the claim under s. 88 of Act IX of 1850.

The following were the questions referred :—

1. Whether the Judge was right in considering that the tiled huts claimed were not goods and chattels ?
2. Whether, if he was right, he was also right in dismissing the plaintiff's claim under s. 88 ?

The first question was referred by the Judge himself with the remark that "the practice of the Court has, for years previous to my tenure of this office, been to treat tiled huts as goods and chattels, though it seems from Mr. Temple's work on the practice of the Court that they were not always treated as such" (2). The second question was referred at the request of the plaintiff's Counsel.

(1) 8 B. L. R., 508.

(2) See Temple's Small Cause Court Practice, 116.

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Mr. *Apcar* for the plaintiff.—The words in s. 88, Act IX of 1850, and in the schedule to the Act are “goods and chattels,” and the same words are used in s. 58 of the same Act. In s. 69 of the same Act, only the word “goods” is used. It is submitted that the word “chattels” is synonymous with the word “goods.” In s. 19 of Act XI of 1865, the words “moveable property” are used. On these words it was held in *Nattu Miah v. Nand Rani* (1) that huts are not “moveable property” under that Act. On the principle of that decision, it is submitted they are not “goods and chattels.” For the definition of “goods and chattels,” see Wharton’s Law Lexicon, 3rd edition, 401; Williams’ Personal Property, 7. Huts cannot be moved without an essential change in their nature. In Act VIII of 1859, ss. 233—235, there is a distinction between “goods and chattels” and “immoveable property.”

On the second question referred, it is submitted the claim to the huts was not rightly dismissed under s. 88. [PONTIFEX, J.—Your contention is that the Small Cause Court could not attach them. COUCH C. J.—S. 88 only applies if the bailiff is justified in seizing the huts.] The claim ought to have been allowed, or the bailiff ordered to release the huts. [COUCH, C. J.—It has long been the practice of the Small Cause Court to attach huts such as these.] The issuing of short date summonses was a practice of long standing, yet this Court decided it was illegal—see *Bhairabdan Ram Chand v. Bassantlal Bhagat* (2).

The opinion of the High Court was delivered by

COUCH, C. J.—The first question put to us by the learned Judge of the Small Cause Court is “whether I am right in considering that the tiled huts claimed are not goods and chattels.” He does not say “within the meaning of s. 58 of Act IX of 1850,” but that is what he must have intended, and the question which we should answer.

What is meant by goods and chattels by s. 58 appears from the subsequent sections. It is one of a series of sections relating to the execution of an order of the Court, and we find

(1) 8 B. L. R., 58.

(2) 9 B. L. R., 256.

It said in s. 69 that "every bailiff executing any process of execution issuing out of the said Court against the goods of any person may, by virtue thereof, seize and take any of the goods of such person except, &c." The word "chattels" does not occur there. I think this shows that, in s. 58, chattels was used as synonymous with goods, and not as having a more extensive meaning. Then in s. 73, the previous sections containing provisions in regard to the sale of the property taken in execution, it is said:—"Until such sale the goods shall be deposited by the bailiff by whom they were taken in some fit place, or they may remain in the custody of a fit person approved by the Judges to be put in possession by the bailiff." That is a provision consistent with goods and moveables being taken in execution, but not with a hut or house being taken. Then s. 80 provides for what is called the goods and chattels of the party being discharged and set at liberty which, I take it, means being restored to the owner, or freed from the execution. All these provisions seem to show that what was intended to be taken in execution of the order of the Small Cause Court were goods and chattels, or what are moveables, and not what in English law are known as chattels real. This construction of s. 58 is supported by the opinion of all the Judges in the case of *Nattu Miah v. Nand Rani* (1). The ground upon which Macpherson, J., put his judgment shows that the huts are not goods and chattels, equally with the opinion of myself and the two Judges who concurred with me. Macpherson J., said he considered that a hut was a house, and certainly a house cannot be properly described as goods and chattels. I think, therefore, that what have been described in this case by the Judge of the Small Cause Court are not goods and chattels that might be taken in execution under s. 58.

The second question submitted to us is whether, if they are not goods and chattels, the learned Judge was right in dismissing the plaintiff's claim under s. 88.

Now s. 88 provides that, "if a claim is made to or in respect of any goods or chattels taken in execution under the process of any

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(1) 8 B. L. R., 508.

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Court, &c." If these are not goods and chattels taken in execution under the process of the Court, they do not come within the words of that section. What it was intended for is that, when the bailiff had, in execution of the order of the Small Cause Court, seized property which, if it were the property of the defendant in the suit, might be taken in execution, and another person had put in a claim to it, the claim should be summarily dealt with by the Small Cause Court. But here the bailiff has taken in execution that which even if it were the property of the debtor, he would not be at liberty to take, and though it may seem hard that the claimant should be obliged to resort to a suit in order to establish his right, and to prevent his property being sold, that is the proper remedy. The bailiff, by seizing what the warrant of the Small Cause Court could not authorize him to seize, has been guilty of an illegal act, a trespass for which he is liable to be sued, and for which he may have to pay such damages as the owner of the huts may have suffered in consequence. Seeing what is stated in the case by the Judge of the Small Cause Court, he will probably not suffer any serious injury. An order will be made which will set matters right.

I think we must answer both the questions, which have been put to us, as the learned Judge has decided, that huts are not goods and chattels within the meaning of the Act, and that the Judge was right in dismissing the claim.

Attorney for the plaintiff: Mr. Vertannes.

APPELLATE CRIMINAL.

Before Mr. Justice, Kemp and Mr. Justice Phear

THE QUEEN v. BELAT ALI AND OTHERS.*

1873
April. 24.

Evidence Act (I of 1872), s. 30—Confession of a Prisoner when admissible against Co-Prisoner—Trial by Jury.

To render the confession of one prisoner jointly tried with another admissible in evidence against the latter, it must appear that that confession implicates the confessing person substantially to the same extent as it implicates the person against whom it is to be used, in the commission of the offence for which the prisoner are being jointly tried.

In this case the appellants, together with Kassim Mundul, Budden Mundul, Moniruddin Mundul, and Ahad Sheikh, were charged before the Deputy Magistrate of Bongong, under s. 325 of the Indian Penal Code, with having caused grievous hurt to one Mandari Mundul, and were sentenced to imprisonment for one year. From this sentence several of the prisoners appealed to the Judge of the district, who was of opinion that, if any offence had been committed, it was one triable by a Court of Session only, and accordingly ordered the prisoners to be committed for trial before the Sessions Court on the charge of the culpable homicide of Mandari Mundul, punishable under s. 304 of the Indian Penal Code. On the trial before the Deputy Magistrate, Kassim Mundul, made a statement to the effect that Mandari Mundul was in the habit of telling stories to Brindabun Baboo the zemindar, and that he (Kassim) and the other villagers held a committee, and resolved to thrash Mandari; that afterwards Belat Ali took him to a musjeed, and there they both swore to give the thrashing; that a few days afterwards they ordered the villagers to thrash Mandari; that after doing so, the villagers came and told them, and that they had ordered them to take Mandari to his own village; that he was at a distance and saw what the others did, but that he was not near the beating; and

* Criminal Appeal, No. 277 of 1873, from an order of the Session Judge of Nuddea, dated the 12th February 1873.

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that he did not know when Mandari died. Budden Mundul also deposed before the Magistrate that Belat Ali, Setabdi Mundul, Kassim, Chowdhur, Nassim, and others held a committee, and that they ordered the others to beat Mandari, and that during the beating, they remonstrated; that they saw the beating; that Setabdi, Belat Ali, and Kubeer Biswas ordered Mandari to be removed to his own village, and that Mandari was beaten because he used to tell tales to Brindabun Baboo. Moniruddin also stated to the Magistrate that he did not kill Mandari, but that he and others were ordered to give Mandari a beating; that Belat Ali, Budden, Kassim, Kubeer, and Setabdi told them that they were to give Mandari such a beating as not to kill him, and that they would pay any expenses which would be incurred; that he saw Mandari being beaten, and that he himself had given him three or four slaps.

On the trial of this case in the Sessions Court, the Judge admitted these statements in evidence, and with respect to such evidence, he charged the jury as follows:—"These are the statements of the prisoners Kassim, Budden, and Moniruddin taken by the Deputy Magistrate, and which give us the reasons for the beating inflicted. These statements are evidence against the persons making them, and if true, they show the part that the three confessing prisoners had in planning the assault in which Moniruddin took an active part, Budden being present, and Kassim close by. These prisoners now say that they made these statements at the instance of the darogah, but you will remark that when punished by the Deputy Magistrate, these prisoners did not appeal, nor urge that their confessions had been extorted, a very good ground of appeal had it been the case. No reason is apparent why, if not true, these statements should have been made; nor as to how the story as to the conspiracy against Mandari, in which we are told the whole village joined, could have arisen if absolutely without foundation. Under s 30 of the Indian Evidence Act, the confession of one person affecting himself and others concerning an offence for the committing of which the confessing person and the others are being jointly tried 'may be taken into consideration,' i. e., the confessions may be used as evidence against the persons not making them.

You will therefore take the statements of Kassim, Budden, and Moniruddin into your careful consideration, and you will weigh the evidence they afford as you would any other evidence." In addition to these statements there was also the evidence of one Jakur Ali, who was a servant of Brindabun Baboo. The jury found the prisoners guilty, and the Sessions Judge sentenced them to three years' rigorous imprisonment. From the sentence Belat Ali, Sonatun Porooie, Setabdi Mundul, Kubeer Biswas, Soneer Sheikh, and Chowdhur Sheikh appealed to the High Court.

Mr. Ghose (with him Baboo Biprodass Mookerjee) for the appellants.—A confession to be evidence against a co-prisoner must implicate both the prisoner confessing as well as the co-prisoner—*The Queen v. Mohesh Biswas* (1), Here neither

[(1) *Before Mr. Justice Phear and Mr. Justice Ainslie.*

**THE QUEEN v. MOHESH BISWAS
AND OTHERS.***

The 23rd January 1873.

*Evidence Act (I of 1872), ss. 30 & 133—
Confession of one Prisoner when admissible against another—Accomplice—Corroborative Evidence.*

Mr. Ghose (with him Mr. Rochfort) for the appellants.

THE judgment of the Court was delivered by

PHEAR, J.—In this case four prisoners, Mohesh Biswas, Prilhad Doss, Goggun Sikdar, and Dwarki Joardar, have been convicted of murdering one Tincourie Karigur, and of making away with his dead body; and a fifth person, Ram Indro Doss, has been found guilty of abetting the four first named persons in the commission of the offence of murder. All five have been sentenced to transportation

for life. Putting on one side for a moment the testimony of Soorat Ally, and the statement made by Ram Indro Doss one of the convicted persons, the evidence in the case is very slight, and may be shortly stated as follows (The learned Judge proceeded to read and comment on the evidence, and having read the following passage:—"I searched Mohesh's house and found the dao with marks of blood on it," continued):—This is the whole of the evidence with the exception I first made, and it is at once remarkable that, until we come to the last passage which I have just now recited, there is not a single word or fact which implicates any one of the five prisoners in the commission of any offence or act whatever, and I will go further and say that this evidence leaves it certainly doubtful whether even any trace of the missing man has yet been discovered. (The learned Judge, after reading the principal portions of the evidence except that of Soorat Ally and Ram Indro, continued) :—Clearly I think, for some reason or other, the principal witnesses to the preliminary facts in this case have very

* Criminal Appeal, No. 956 of 1872, from an order of the Sessions Judge of Jessore, dated the 26th September 1872.

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Kassim Mundul, nor Budden Mundul were in any way affected by the statements made by themselves before the Deputy

materially varied their testimony in the Sessions Court, as compared with the statements which they made at first when it may be supposed that they made them unbiased. The result then is that, taking the evidence on the record all together, other than the deposition of Soorut Ally and the statement of Ram Indro, which I shall notice in detail presently, it may be almost said that the case of the prosecution is scarcely even started, and certainly that evidence does not in any degree tend to implicate any one of the prisoners in the commission of the offence with which they were charged. But Soorut Ally's evidence, as far as it can be depended upon, entirely alters the complexion of the case. I will read it at length. (The learned Judge read the evidence and continued):—I have said that this deposition entirely changes the complexion of the case. Manifestly, if it can be relied upon, it clearly establishes the charge of murder against the first four prisoners at least. But then this is the evidence of an accomplice. If the story which he gives is true, he went and fetched the man, was present when his master twisted the cloth round the man's neck, stood by while the man was dragged into the hut, accompanied the prisoners when they carried off the body, and put it down in the indigo field; there stood looking on while every man, excepting himself and Ram Indro, as he says, took the *dao* by turns, hacked the skull, and cut the body into pieces, and then went away with them, when the remains of the body were put into the sack, and were pitched into the river. Clearly the part he admits that he took in the whole of this transaction, is such a participation in the principal acts of the murderers as constitutes him an accomplice, and it is well understood now that the evidence of an accomplice cannot be safely acted upon as against persons accused by him excepting when it

is corroborated in regard to the particulars which implicate them. This principle has been enunciated many times by this Court, and inasmuch as a reported case *Queen v. Baikanthanath Banerjee* (1) has been referred to, in which the judgment of the Division Bench, dealing with this very matter, was delivered by myself, I will read from the note in *Queen v. Baikanthanath Banerjee* (1) what was then said, because it still represents my views. (The learned Judge read that judgment and continued):—The case I have now read is not precisely, so to speak, on all fours with the present one, but the remarks there made do almost to their full extent apply to the question which is now before us. The corroboration which is needed to make Soorut Ally's testimony against the prisoner's trustworthy, should be corroboration derived from evidence which is independent of accomplices, which is not vitiated by the accomplice character of the witness not affected, namely, by the disposition on the part of one whose guilt is disclosed to purchase impunity or advantage by falsely accusing others; and further should be such as to support that portion of the accomplice's testimony which makes out that the prisoner was present at the time when the crime was committed, and participated in the acts of commission. The Judge has found corroboration in more than one particular. But it appears to me that that corroboration does not bear the character which I have endeavored to describe as that which it is necessary it should bear in order to render the accomplice's evidence trustworthy against the prisoner. (The learned Judge read the evidence which the Judge of the lower Court relied on as being corroborative of the deposition made by Soorut Ally, and proceeded). The Judge says:—"And finally there is the confession of Ram Indro Dass which, under s. 30 of the new Evidence Act, may be taken into

(1) 3 B. L. R., F. B., 2.

Magistrate, therefore the Judge misdirected the jury when he told them to consider those statements as evidence against the

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consideration against all the prisoners." With regard to this I shall proceed now to say a few words. But first I will remark that up to this point Soorut Ally's evidence has certainly not received that amount of corroboration which would justify a Court of Criminal Justice in coming to the conclusion that the persons who are affected by it were guilty of the offence with which he accused them, Ram Indro, the fifth prisoner, when before the Magistrate, made a long statement of that which he knew of the case. Of course, it may be every word of it taken and acted upon as against himself, but it is only admissible against the others whether for the purpose of corroboration of an accomplice's testimony, or otherwise so far as it is made available by s. 30 of the new Evidence Act, which says:—"When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person, as well as against the person who makes such confession." It appears to me that this section must be interpreted to mean that the statement of fact made by the prisoner which amounts to a confession of guilt on his part may be taken into consideration, so far and so far only as that particular statement of fact itself extends against the other prisoners who are being tried as well as himself for the offence which is thus confessed. I think the illustrations which are given to this section bear out this view. If this be so, we must be careful not to apply statements made by Ram Indro Dass before the Magistrate against other prisoners than himself further than those same statements amount in themselves to a confession of guilt on his part. The remainder of the prisoners besides Ram Indro, I think without exception, both before the Magistrate and in the Sessions Court, denied having had any knowledge or any participation in the

murder, and Ram Indro himself in the Sessions Court stated that whatever he had said before the Magistrate was untrue. I will proceed to the statement he made before the Magistrate (the learned Judge read the statement and continued):— It is obvious on the first perusal of this statement that the prisoner kept carefully clear of confessing any participation in the murder. The most that the statement has whole amounts to is an admission on the part of Ram Indro of aiding and abetting by his presence all the other persons mentioned by him who were engaged in cutting and making away with the dead body of the man who had already been murdered. The statement so, far as it is a confession only, is I think limited to this, namely, the statement of facts which amount to a criminal participation in making away with the body, and consequently this is all which can be taken into consideration under s. 30 against the other prisoners. But this statement so limited undoubtedly does bring Moresh Biswas, Prilhad Doss, Gogun Sikdar, and Dwarki Joardar to the indigo-field and represents them as engaged there in cutting up and making away with the dead body. It, therefore, corroborates the statement of Soorut Ally in these particulars. The question is, does this amount to a sufficient corroboration such as will justify us in accepting as true, and acting upon, Soorut Ally's testimony. On the whole, I think not; shortly for this reason that if, instead of being the statement of a fellow prisoner, it had been the evidence given on oath of Ram Indro Dass examined as a witness in the case, it would not have been anything other than the evidence of an accomplice, and as such I think it does not (I may say generally, cannot) constitute satisfactory corroboration of the other accomplice's testimony; certainly in this particular instance, I think it is in itself extremely unsatisfactory.

The result then of the best consideration

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appellants. These statements might perhaps have been admissible if the charge had been one of conspiracy, but the charge against the prisoners before the Magistrate was grievous hurt. Again, to make a confession of a prisoner admissible in evidence against a co-prisoner, the offence charged against both must be the same, and they must both be on their trial for that identical offence—Act I of 1872, s. 30, illust. (b). Moniruddin, no doubt, stated that he had given Mandari a few slaps, but this does not amount to a confession of having caused grievous hurt.

No one appeared on behalf of the Crown.

The judgment of the Court was delivered by.

PHEAR, J.—We think that the verdict of the jury must be set aside on the ground that the Judge wrongly directed them with regard to the reception of the so-called confession of two at least of the prisoners who were jointly tried with the appellants, namely, Kassim Mundul and Budden Mundul. I have, on a former occasion, in the case of *The Queen v. Mohesh Biswas* (1), already explained the view which I take as to the proper application of s. 30 of the new Evidence Act. That view is shortly this namely, that before a confession of a person jointly tried with the prisoners can be taken into consideration against him, it must appear that that confession implicates the confessing person substantially to the same extent as it implicates the person against whom it is to be used, in the commission of the offence for which the prisoners are being jointly tried. It seems to me that it is this implication of himself by the confessing person which is intended by

which I have been able to give to the of a murdered man
 record in this case is that the evidence is I have already stated the grounds upon
 altogether insufficient to support the convictions which I think it cannot be trusted as
 which have been come to of the evidence against the other prisoners, but
 the first four prisoners, Mohesh Biswas, I am not prepared to say that it ought
 Prilhad Doss, Goggun Sikdar, and not to be trusted so far as it amounts to
 Dwarki Joardar. As to Ram Indro the an admission of guilt in himself . . .
 case is different. His own statement before The four first prisoners must be therefore
 the Magistrate, if it can be believed, is acquitted, and the sentence passed upon
 most distinctly a confession of having them set aside. The appeal of Ram Indro
 knowingly and designedly taken part in is dismissed.
 the making away with and concealment of
 a dead body which he knew was the body

(1) *Ante*. p. 455

the Legislature to take the place as it were of the sanction of an oath, or rather which is supposed to serve as some guarantee for the truth of the accusation against the other. In the case before us neither Kassim Mundul nor Budden Mundul say anything which amounts to a confession of their own individual guilt upon the charge whereon they were tried jointly with the petitioners, appellants. Both these men distinctly keep themselves out of all complicity in the actual facts which are charged against all the prisoners jointly, and upon which the appellants have been convicted with the others, so that it appears to my judgment that the statements which these men make against the appellants are simply, so far as the charge upon which they have been convicted is concerned, statements made without either the sanction of an oath, or of that substitute for that sanction to which I have already referred, namely, the implication of themselves on the charge upon which they have been tried with the appellants,—in short, without the application of any test of truth whatever. There may be some doubt whether these remarks are applicable to the confession of Moniruddin. Moniruddin, no doubt, does state facts against himself which amount to a confession of guilt upon the charge on which he and the other prisoners have been convicted: at the same time the statements which he makes in this confession against the appellants, if they amount to anything material, seem to me to be statements which make them accessories before the fact if it all, and not actual actors in the transaction which constitutes the foundation of the charge. But however this may be, it is sufficient for me to say that, in my opinion, in so far as the Sessions Judge has directed that the statements of Kassim Mundul and Buddun Mundul against the prisoners can in this trial be treated as evidence against the appellants, this is a wrong direction on a point most material to the fate of the trial, and therefore I think the verdict must be set aside. I further think that we ought not in this case to direct a fresh trial because upon the best consideration which I have been able to give to the evidence upon the record, the only evidence which there appears to affect the appellants, in addition to the statements of these so-called confessing prisoners, is the testimony

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of one Jakur, and I feel that, if I had to try the case as a Juror upon this man's testimony, taken with even the statement of Muniruddin, supposing this statement to be admissible, I could not convict the appellant of the charges upon which they have been convicted in the Court below, It, therefore, appears to me that we ought not to send back this case for a new trial, simply because I am of opinion that the evidence on the record would not be sufficient upon such new trial to convict the prisoners. I would, therefore, set aside the verdict, and direct that the prisoners be discharged.

Conviction set aside

APPENDIX.

APPENDIX.

Before Mr. Justice Phear.

THE QUEEN v. HICKS.

1872
December 7.

Evidence Act I (of 1872) s. 24—Confession under threat made for purpose other than to extort Confession.

THE prisoner Hicks was tried for wounding one Lynch with intent to murder him, and wounding him with intent to do grievous bodily harm. The crime was committed on the high seas on a ship called the *Peruvian Congress*, on which the prisoner was a seaman.

The *Standing Counsel* (Mr. Kennedy) having proved that the master of the *Peruvian Congress* had sailed from Calcutta, and could not be found, tendered, under ss. 33 and 80 of the Evidence Act (I of 1872), his deposition before the committing Magistrate. The deposition contained the following statement of an admission alleged to have been made to the deponent by the prisoner when in custody:—

“I said to the prisoner ‘is this the knife you stabbed him with?’ He said ‘Yes, Sir.’ I said, ‘this beats anything I ever saw!’ He said, ‘well, I intended to kill him, as I know d—d well that I shall be hanged for it.’”

The alleged admission was made under the following circumstances as stated in the master’s deposition:—

“At this time,” &c., immediately after the commission of the crime, “I was making preparations to resist any mutiny. I went up on the poop, where I had sent the carpenter, the boatswain’s mate, the painter, and the carpenter’s mate with muskets. I took with me my rifle. The men were all in the fore-castle at this time. I called them to come out, saying, that I would fire upon them if they did not do so. They all came aft on the starboard side. I saw the prisoner with them. I said to him ‘do you surrender yourself as a prisoner?’ He said, ‘Yes, Sir.’ I had him placed in irons.”

The *Standing Counsel* asked that the portion of the deposition containing the alleged admission by the prisoner might be read; but

PEAR, J., refused to allow this, as the admission was stated to have been made immediately after the prisoner with others had been threatened by the witness, to whom the statement was made, with a loaded rifle. It was immaterial that the threat was not for the purpose of extorting the confession, but in order to suppress an attempt at mutiny.

Before Mr. Justice Phear.

THE QUEEN v. J. MACDONALD.

1872
December 3.

Evidence Act (1 of 1872), s. 8, Illustration k—Admission—Confession.

The prisoner was indicted for theft and dishonestly receiving stolen property. The prosecutor, while travelling by train to Calcutta, discovered that his courier bag, containing his watch, chain, and a sum of money, had been stolen. He reported his loss to a railway Police Inspector at the first station at which the train stopped after he became aware of the theft, the prisoner not then being present.

The *Standing Counsel* (Mr. Kennedy) tendered evidence of this report.

PEAR, J., held it to be admissible under s. 8, Illustration K, of the Evidence Act (1 of 1872).

The *Standing Counsel* next tendered evidence of a statement made by the prisoner to the constable who arrested him, to the effect that the watch and Rs. 1,000 had been given to him by his sister, and that he had bought the chain.

PEAR, J., observing that there is a distinction in the Evidence Act, between admissions and confessions, admitted the evidence.

See also
37 Cal 467

Before Mr. Justice Kemp and Mr. Justice Glover.

1872
August 28.

RAO BANEERAM, GUARDIAN OF RAO MADHUBRAM, MINOR (DECREE-HOLDER),
v. RAMNATH SHAHA AND OTHERS (JUDGMENT-DEBTORS).*

Act VIII of 1869 (B. C.), s. 52—Act X of 1859, s. 78—Discretionary Power of a Court to stay execution of a Decree for ejectment

The Court has discretion to stay execution on other grounds than those on which it is bound to do so under s. 52 of Act VIII of 1869 (B. C.).

THE decree-holder obtained two decrees against the defendant for arrears of rent. The first decree was obtained on the 29th November 1870 for arrears of rent of the years 1275, 1276, and up to Assar of the year 1277 (17th April 1868 to 15th July 1870). The second decree, which was passed *ex parte*, was for the arrears of rent for the remainder of the year 1277 (to 12th April 1871). In the second suit there was a prayer for ejectment of the ryots for arrears of rent unpaid, and the former decree was adduced by the plaintiff as evidence of the existence of the arrears. In the plaint in this second suit,

* Miscellaneous Special Appeal, No. 201 of 1872, from an order of the Judge of Hooghly, dated the 5th April 1872, reversing an order of the Moonsiff of that district, dated the 23rd September 1871.

the plaintiff admitted receipt of Rs. 16 as part-payment for current arrears. The plaintiff applied to the Moonsiff to execute his second decree by ejecting the ryots. The Moonsiff thereupon served a notice on the ryots to show cause why they should not be ejected, whereupon they paid up the balance due for 1277 (to 12th April 1871). The Moonsiff held that, as the judgment-debtor had not paid the money within fifteen days of the date of the decree, the plaintiff was entitled to execute his decree by ejecting him. Before the Moonsiff the judgment-debtors declared their intention of applying to the Court for a review of the *ex parte* judgment in the second case, and prayed for stay of execution in the meantime. The Moonsiff was of opinion that, so long as the decree was in force, he had no power, under s. 54 of Act VIII of 1869 (B. C.), to stay execution of it. He accordingly ordered the ryots to be ejected.

Against this order the judgment-debtors appealed to the District Judge. The Judge on appeal reversed the order of the Moonsiff, and disallowed the prayer for ejectment of the appellants. He observed:—"Two points seem to me to arise in this case: first, is the ryot entitled to protection on account of this payment after fifteen days from the date of the decree? Second, having received Rs. 16 as part-payment of 1277 (1870), can the zamindar eject the ryot, because there was a balance due at the end of the year? On the first point, seeing that the respondent allowed the notice to be served without objection, and seeing that it was an *ex parte* decree, to re-open which, unless the Court had accepted his payment, the ryot would have been at liberty to apply under s. 119 of Act VIII of 1859, I think that this is peculiarly a case in which, if ever, an Appellate Court can exercise the discretion which is given to it under the judgment of the High Court in the case of *Nobokristo Mookerjee v. Ramesshur Goopto* (1). It is unnecessary thereupon to consider the second point, &c."

The decree-holder appealed to the High Court.

Baboo *Mohendro Nath Mitter* for the appellant.

Baboo *Bhoyrubb Chunder Bannerjee* for the respondents.

The judgment of the Court was delivered by

KEMP, J. (after stating the facts).—This case turns upon the wording of s. 52 of the Rent Act, Act VIII of 1869, the wording of which is precisely the same as that of the old s. 78 of Act X of 1859, which enacts that, "in all cases of suits for the ejectment of a ryot, the decree shall specify the amount of the arrear, and if such amount, together with interest and costs of suit, be paid into Court within fifteen days from the date of the decree, execution shall be stayed." Now, in the case which has been referred to, *Nobokristo Mookerjee v. Ramesshur Goopto* (1), Sir Barnes Peacock

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(1) 2 Wyman's Act X Cases, 75.

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distinctly says, in considering s. 71 of Act X, which then applied, and the words of which are precisely the same as those of s. 52 of Act VIII of 1869, that the ryot is entitled to have execution stayed without any order of the Court, if he pays the money into Court within the limited period, but it does not say that execution shall not be stayed under any circumstances, either by the Court itself or by the Appellate Court. We think, therefore, that, under that ruling, the Judge had discretion, and, looking to the circumstances of the case, we think that he was right in his exercise of that discretion.

We dismiss the appeal with costs.

Before Mr. Justice Kemp and Mr. Justice Glover.

1872

Nov. 29.

IN THE MATTER OF THE PETITION OF ROHOMAN SIKKAR AND ANOTHER.*

Act V of 1861, s. 17—Order of executive nature.

The High Court, while considering that an order by a Magistrate professing to act under s. 17 of Act V of 1861 was illegal, refused to interfere, on the ground that the order was one of an executive nature.

Reference to the High Court by the Sessions Judge of Rajshahye.—In February 1872, a traveller passing along a foot-path, opposite the village of Chobari was set upon in open day by two men, who murdered and robbed him. The Assistant Magistrate of Serajgunge obtained sufficient evidence against two of the inhabitants of Chobari on which to commit them for trial before the Sessions Court for the aforesaid murder, but the principal witnesses, on whose evidence he so committed these two persons, retracted before the Sessions Court the statements they had made before the Assistant Magistrate, and the case consequently broke down in the Sessions Court, and the accused persons were discharged on the 22nd of April last. On the 10th of May, the Assistant Magistrate drew up a proceeding, in which, after remarking that there had been a serious murder in Chobari, and that many *bundmasles* lived in that village, he called upon the Police Inspector to report whether it was necessary to appoint special constables for the security of the lives and property of people passing by or through Chobari during the then approaching rainy season, and, if such a measure were necessary, to submit a list of five of the principal residents of that village.

The report of the Inspector being in favor of the appointment of such special constables, the Assistant Magistrate, on the 27th of May, appointed Rohoman Sikkar, Moonshree Akhoond, and three other inhabitants of Chobari, as special constables under the provisions of s. 17, Act V of 1861, directing them to state within ten days any objections they might have to being so

* Reference to the High Court under s. 434 of the Code of Criminal Procedure by the Sessions Judge of Rajshahye.

appointed. No objections having been made by any of those five persons by the 8th of June, the Assistant Magistrate, on that date declared them duly appointed special constables, and bound to perform the duties of officers of Police under the provisions of ss. 17, 18, and 19 of Act V of 1861. On the 6th of July, Rohoman Sirkar and Moonshee Akhoond petitioned the Assistant Magistrate to withdraw his order with regard to them, complaining at the same time of the hardship and pecuniary loss entailed upon them by the operation of that order, they being mahajuns and traders, and their profits and success in business depending in a great measure on their travelling about the country, and being free to leave Chobari whenever, and for as long as, it was to their interest to do so, a freedom of which they were deprived under the Assistant Magistrate's order. The Assistant Magistrate did not comply with their prayer, and they petitioned this Court under s. 424 of the Code of Criminal Procedure.

I consider the Assistant Magistrate's order is illegal, because the circumstances which could alone render such order legal did not exist, nor was any one of those circumstances reasonably to be apprehended at the time of the passing of that order.

The judgment of the High Court was delivered by

GLOVER, J.—The order of the Assistant Magistrate appears to us to be one of a purely executive nature, and one with which this Court has no power to interfere.

We may say, however, that we agree with the Sessions Judge in thinking the order illegal, inasmuch as s. 17, Act V of 1861, refers to cases of unlawful assembly, riot, or disturbance of the peace only, and not to crimes of the nature referred to in this proceeding.

If the Assistant Magistrate considered the Police force already entertained insufficient to prevent crime in the village of Chobari, he should have applied for sanction to an increase, under s. 15 of the Act.

Before Mr. Justice Kemp, and Mr. Justice Glover.

ESHAN CHUNDER GHOSE AND OTHERS (PLAINTIFFS) v. HURRISH CHUNDER BANERJEE (DEFENDANT).*

1872
April 26.

Suit for Khas Possession—Occupation for more than 12 years by execution of a Mud-house—Right of Occupancy—Act X of 1859, s. 6—Denial of Landlords Title.

THE plaintiffs as talookdars brought a suit against their tenant Muddun Ghose, for recovery of rent at enhanced rates of lands held by him, including in the claim the two cottahs in dispute in the present suit. The tenant denied that

* Special Appeal, No. 859 of 1871, from a decree of the Subordinate Judge of Hooghly, dated the 24th April 1871, affirming a decree of the Moonsiff of that district, dated the 23rd January 1871.

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these two cottahs formed part of his holding, but alleged that they were part of the *lakhiraj* holding of one Hurriah Chunder Banerjee. The present defendant, Hurriah Chunder, intervened in that suit and claimed the two cottahs as *lakhiraj*. The result of the suit was that rent was assessed on the land admitted by Muddun Ghose to be in his possession, excluding the two cottahs.

The plaintiff next instituted a suit against Hurriah Chunder Banerjee for declaration that these two cottahs were his *mal* lands, and for possession. They obtained a decree simply declaring their "*mal* rights" over the lands in dispute. This decree was on special appeal upheld by the High Court. The plaintiffs having served notice to quit, now sued Hurriah Chunder Banerjee for recovery of *khas* possession of these two cottahs with mesne profits, and they prayed that he might be ordered to remove a mud house erected by him on the land. The defence was that, as the plaintiffs had already claimed *khas* possession and obtained a decree, simply declaring their right to receive rent the present action could not be maintained; that as the defendant had for twenty years been in possession, and had erected a house, at a great expense, without any opposition from the plaintiffs, the latter could not now sue for *khas* possession.

The Moonsiff held that the plaintiffs were never in *khas* possession; that the defendant had for twenty years been in possession of the land, as was evidenced by his having erected a dwelling-house on it; and that therefore it would be inequitable and unjust to give the plaintiffs a decree for *khas* possession. He further held that the plaintiffs had established their "*mal* rights" over the land, and awarded them mesne profits for the period claimed at the rate assessed, with costs. Against this decree the plaintiffs appealed. The Subordinate Judge, on appeal, concurred with the reasons assigned by the first Court, and in addition held that the plaintiffs having already sued for *khas* possession, and having only obtained a decree declaring their right to receive rent, they could not again sue for *khas* possession and he dismissed the appeal.

The plaintiff appealed to the High Court.

Baboo *Turuck Ntha Dutt* for the appellants contended that the suit was not barred by s. 2 of Act VIII of 1859. In the former suit there was no prayer for the removal of the mud house. In that suit, he urged, there was a finding to the effect that the defendant had got into possession as *koorfa* tenant, or sub-lessee of Muddun Ghose, and he afterwards in the suit for rent against Muddun had fraudulently set up a *lakhiraj* holding. The present defendant ought, therefore, to be regarded as a trespasser. The defendant has acquired no right of occupancy in the land, he having held as a sub-lessee, and denied the plaintiff's title; see *Sheikh Peer Buz v. Sheikh Mauhjan* (1). There was no acquiescence on the part of the plaintiffs to the defendant's

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building a mud house. The plaintiffs had no knowledge of the defendant having ever held the land until the rent suit.

Baboo Bama Churn Banerjee for the respondent.—The fact of the land being held to be not *lakhiraj* cannot deprive the defendant of his occupancy right acquired by length of possession. In the former suit the only question tried was whether the land was *lakhiraj* or not. The defendant has, at considerable expense, erected a dwelling-house upon a *bona fide* belief that he had a right to do so, and it is found by the Court below that the defendant has been in possession for twenty years. No proof was given of the plaintiff's ignorance and it is impossible to suppose that they could have remained ignorant of the existence of the dwelling-house for so long a period. The defendant cannot be regarded as a trespasser, merely because he had set up a title which he could not satisfactorily establish. It would be very hard for the defendant now to have to remove the building, nor would the plaintiffs suffer in any way by its continuance when they have established and obtained a decree for rent; see *Beni Madhab Banerjee v. Jai Krishna Mookerjee* (1).

The judgment of the Court was delivered by

KAR, J. (after shortly stating the facts).—The first point is whether s. 2 of Act VIII of 1859 applies to this case or not. We are clearly of opinion that s. 2 does not apply. That section refers to causes of action which have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties. Now, it is very clear that the present cause of action, which is for ejectment of the defendant and *khas* possession, is not the same cause of action tried in the former suit. Therefore s. 2 does not apply.

We then come to the question whether the defendant has acquired a right of occupancy in this land. We think that he has not. It is very clear that, if the defendant claims to have held this land as a *koorfa* tenant, or sub-lessee of Muddan Ghose, such holding would not give him a right of occupancy. Then it may be said that he has held the land as *lakhirajdar*, but it has been found in a suit between the parties, namely, the present plaintiffs and the defendant, that the land was not *lakhiraj*, but that it was the *mal* land of the plaintiffs. Therefore, if the defendant held as *koorfsadar*, he acquired no right of occupancy, and if he held otherwise, he held as a trespasser, and his holding as a trespasser would not under s. 6 give him any right of occupancy. This has been ruled in the case of *Sheikh Peer Bux v. Sheikh Meahjan* (2) by the late Chief Justice Sir Barnes Peacock and Bayley and Kemp, JJ.

Then we come to the question of equity. We do not think that this is a case which is at all on all fours with the case of *Beni Madhab Banerjee v. Jai Krishna Mookerjee* (1). In this case we do not think that the defend-

(1) 7 B. L. R., 152 *

(2) W. R., Sp. No., 146.

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ant is entitled to any sympathy from the Court. It appears that he fraudulently set up this *lakhirdj* holding in collusion with the tenant of the plaintiffs, Muddun Ghose. A great deal has been said about the fact of the plaintiffs standing by and allowing the defendant to erect this mud-house at considerable expense. Now, until the point was settled in the suit brought by the plaintiffs to have his *adl* right declared, and which suit was brought after the plaintiffs had been unsuccessful in the suit against the ryot, Muddun Ghose, for the rent of these two cottahs, we think it cannot be said that the plaintiffs were under any other impression but that these lands were part and parcel of the holding of their tenant Muddun Ghose; that tenant having a right of occupancy, and the land being *basu* land (1), any erection by any third party holding from Muddun Ghose would not be a matter with which the zemindar could interfere; but the matter assumed a very different aspect when the zemindar on bringing his suit for rent against Muddun Ghose was met by the plea that a portion of the land was not in the tenancy of Muddun Ghose, but was the *lakhiraj* of the defendant—a plea which eventually wholly failed in the subsequent suit. We therefore think that the ruling in *Beni Madhab Bannerjee v. Jai Krishna Mookerjee* (2) does not apply to this case. That was a case in which a party took lands from the zemindar and transferred them to other parties, who erected *pakka* buildings thereon. The zemindar wanted to demolish these *pakka* buildings, on the ground that the original tenant had no transferable rights. It was held in that case that there was evidence, although that evidence was meagre, of a custom to transfer, and it was considered that the conduct of the zemindar, in allowing his ryot to transfer the lands and the transferee to erect *pakka* buildings without immediately attempting to stop him in so doing, amounted to an acquiescence in the transfer, and to standing by, while the tenant spent a considerable amount of money on the buildings.

We therefore think that the plaintiff is entitled to the relief he asked for, namely, to *khas* possession. We therefore decree his suit on the terms of the plaint, reversing the decisions of the Courts below, with costs to be paid by the defendant, respondent.

(1) The site of a building.

(2) 7 B. L. R., 152.

Before Mr. Justice Kemp and Mr. Justice Glover.

**KALI PFRESHAD DUTT (DECREE-HOLDER) v. RAJAH MAHOMED
JOWAHUR JUMMA KHAN (JUDGMENT-DEBTOR).***

1872
June. 14.

Priority of Attachment, Effect of—Right of first attaching Creditor to proceed against other Property of Debtor after the Sale of the Property attached by a second attaching Creditor.

Baboo Kally Mohan Dass and Bama Churn Banerjee for the appellant.

Baboo Mohiny Mohun Roy for the respondent.

THE facts of this case and the points raised in appeal are fully set forth in the judgment of the Court delivered by

KEMP, J.—The decree-holder is the appellant in this case. It appears that he attached certain released *lakhiraj* lands in satisfaction of his debt. The judgment-debtor applied for time to raise the money by way of mortgage, or in some other way. The judgment-creditor allowed this, and the sale was postponed, the attachment subsisting. Subsequently, another creditor brought to sale the same property, and the property was sold. The judgment-creditor, the appellant before us, now seeks to attach and sell other property belonging to his judgment-debtor, and both Courts have held that he is not at liberty to do so, inasmuch as his attachment of the property first attached still subsists, and the lands are subject to all liability under his decree, and that he must therefore proceed against these lands and sell them, and that he is not at liberty to attach and sell other lands. We think that the finding of the Lower Courts is wrong. We have not been shown that the surplus sale proceeds are sufficient, supposing the special appellant to have priority of attachment, to satisfy the whole of his claim, and it is clear from the ruling in *Unnopoorna Dassea v. Gunga Narain Paul* (1), that "if two parties attach a property in execution of separate decrees, and the sale of the property takes place at the instance of the decree-holder who made the second attachment, the decree of the decree-holder who made the first attachment will be first satisfied from the sale proceeds; but the sale cannot be disturbed if such decree-holder, instead of taking his money out of the sale proceeds, put up the rights and interests of his debtor in the property again for sale." Now in this case, as already observed, at the most all that the special appellant could claim would be the right of priority to be satisfied out of the sale proceeds; we have not been shown whether the sale proceeds

* Miscellaneous Special Appeal, No. 94 of 1872, from an order of the Judge of Beerbhoom, dated the 16th December 1871, affirming an order of the Subordinate Judge of that district, dated the 22nd of May 1871.

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would be sufficient to satisfy his decree, and it is represented to us that they are nothing like sufficient; and if he was to proceed to sell the property which has already passed by sale to a third party, the sale could not be disturbed. We think therefore that the judgment-creditor was perfectly justified in proceeding against any other property of his judgment-debtor and we do not see how the judgment-debtor is in any way prejudiced by his doing so. It is said that the sudder jumma of the property attached is Rs. 16,000; if that be the case, the judgment-debtor is clearly in a position to pay his just debts, and if he wants to avoid the sale, he must satisfy the decree.

The appeal is decreed with costs, and the decision of the Lower Court reversed.

Before Mr. Justice Phear and Mr. Justice Ainslie.

1873
January 21.

* THE QUEEN v. BHEEKOO KALWAR, *alias* BHRK SHA.

*Criminal Procedure Code (Act X of 1872), s. 425—Trial of Fact of
Unsoundness of Mind.*

THE facts of this case appear sufficiently in the judgment of

PHEAR, J.—In this case the prisoner has been convicted of murder and sentenced to death, and the record has come before us in due course for the confirmation of that sentence. The Judge reports that, under s. 271 of the Criminal Procedure Code, he enquired of the accused whether he wished to appeal, and he signified his intention of not doing so.

On referring to the record we find at the outset a statement written by the Judge to this effect:—"The demeanour of the accused when called on to plead to the charges was so peculiar that I entertained doubts as to his sanity. I therefore thought it necessary to try the question of the accused's unsoundness of mind." The Judge then states that he took the evidence of the Civil Surgeon, and concludes in these words:—"On the evidence of the Civil Surgeon, I cannot hesitate to pronounce that the accused is of sound mind and capable of making his defence." Thereupon the trial proceeded before the jury.

S. 425 of the Criminal Procedure Code enacts that. "if any person committed for trial before a Court of Session shall, at his trial, appear to the Court to be of unsound mind and incapable of making his defence, the Court shall, in the first instance, try the fact of such unsoundness of mind, and if satisfied of the fact shall give a special judgment that the accused person is of unsound mind and incapable of making his defence; and thereupon the trial

* Criminal Referred Case, No. 48 of 1873, from an order of the Additional Session Judge of Howrah, dated the 8th January 1873.

shall be postponed." It appears to us from the use of the words "in the first instance" clear that the Legislature intended the trial of this issue of insanity to be considered as part of the trial of the accused person before the Court; and then we find upon referring back to s. 232 that "all trials before the Court of Session shall be either by jury, or conducted with the aid of two or more assessors." Here the trial was to be by jury; and reading the two sections together, we think that the preliminary issue which the Sessions Judge tried ought to have been tried by the jury, and not by himself personally,

On that ground we think that the whole of the trial has been vitiated, and that the conviction and sentence must be set aside and a new trial directed.

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Before Mr. Justice Macpherson.

1873
January 18.

J. F. WATKINS v. RAJAH ROHEENEE BULLUB.

Act VIII of 1859, ss. 280 & 281—Execution—Schedule.

THE defendant, who had been arrested in execution of a decree, applied to the High Court, under Act VIII of 1859, ss. 280 and 281, for his discharge on surrender of the whole of his property. The property mentioned in the schedule consisted altogether of moveables.

Mr. *Stokoe*, for the judgment-creditor, objected to the matter being heard, as the petition did not state the place or places where the property mentioned in the schedule was to be found.

Mr. *Bonnerjee*, for the judgment-debtor, contended that the words in s. 280, "the places respectively where such property is to be found," related to immoveable property, and not to personal chattels. The property in this case is all chattel property, and must be presumed to be at the place where the defendant was arrested. The objection is a technical one, and the defect, if defect there be, is not fatal, because the petitioner, who is present in Court, may be examined, and the locality of the property ascertained, without sending him back to gaol.

MACPHERSON, J.—Persons applying for the benefit of ss. 280 and 281 must strictly comply with the requirements of those sections. S. 280 says, that the application for discharge shall contain a full account of all property belonging to the applicant, "and of the places respectively where such property is to be found." In the present instance, the applicant has not stated where the property which he declares belongs to him is to be found. This is a most substantial defect in the application: for the judgment-creditor is entitled to the earliest information as to where the property is to be found, so that he may attach it at once if he wishes to do so. The objection taken is a fatal one, and the application for discharge must be refused.

Before Mr. Justice Macpherson.

1871
January 16.

GOBIND CHUNDER DUTT v. KHERODE CHUNDER MITTER.

Act VIII of 1859, s. 239—Service of prohibitory Order by affixing it to Wall of Dwelling-house.

THIS was an application by Mr. Woodroffe, on behalf of the plaintiff, for the appointment of a manager, under s. 243 of Act VIII of 1859, to get in certain moneys of the defendant alleged to have been attached by the plaintiff in the hands of one Panchanun Mitter. It appeared on the affidavits that the prohibitory order attaching the said moneys had been served on Panchanun Mitter by affixing the same to the wall of his dwelling-house.

Mr. Evans, for Panchanun Mitter, contended that there was no binding attachment.

MACPHERSON, J., refused the application with costs, on the ground that, there was no binding attachment, inasmuch as the order had not been served by delivery, or by registered letter, as provided by s. 239 of Act VIII of 1859.

Before Mr. Justice Kemp and Mr. Justice Glover.

1872
July 17.

BHOOBUN MOHUN MONDUL AND ANOTHER (JUDGMENT-DEBTORS) v. NOBIN CHUNDER BULLUB (DECREE-HOLDER).*

Act VIII of 1859, s. 200—Decree for the Performance of a particular act by the Judgment-debtor—Execution.

ONE Nobin Chunder Bullub had obtained a decree that "the defendants do, within six weeks after service upon them of this decree, remove the obstruction and re-open the pathway or lane leading from the north-west end of the plaintiff's house northwards to a public road, as the same existed before the commencement of the suit, and as described in the plaint." The decree-holder made several attempts to execute this decree, and, was on each occasion, met with objections by the judgment-debtors. In April 1872, the Moonsiff ordered the Ameen to execute the decree by causing the obstruction to be removed. Against this order, the judgment-debtors appealed to the District Judge, who, on the 26th of April, upheld the Moonsiff's order.

* Miscellaneous Special Appeal, No. 133 of 1872, from an order of the Judge of the 24-Pergunnahs, dated the 26th April 1872, affirming an order of the Moonsiff of that district, dated the 8th April 1872.

The judgment-debtors appealed to the High Court.

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Baboo Hem Chunder Bannerjee for the appellants.—The decree which is sought to be executed commands the defendant to do a particular act within a specified time. The mode of execution of such a decree is provided for by s. 200 of Act VIII of 1859. When the decree is not for delivery of a specific moveable, it can only be executed by imprisonment of the debtor, or by attachment of his property, or by both.

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Baboo Kali Motun Dass for the respondent.—S. 200 of Act VIII of 1859 does not apply to cases of this kind. Where it is in the power of the Court to carry out the terms of a particular decree, the alternative mode of execution by attachment of the property and imprisonment of the debtor is not to be resorted to. The words "particular act" in s. 200 mean such act as the Court is unable to have performed without the aid of the judgment-debtor. In the present case it is possible for the Court to have the obstruction removed without the aid of the judgment-debtor.

The appellant was not called upon to reply.

The judgment of the Court was delivered by

KEMP, J.—In this case the judgment-debtors are the appellants. It appears that in Cheyt 1276 (March and April 1870), a suit was brought by the vendor of the plaintiff to remove certain obstructions in a pathway; these obstructions being described in the plaint as a wall running east and west, the foundation of a wall running north and south, and the closing of a pucca drain. The pathway is described as being 60 *haths* in length, and 4 *haths* in breadth. The plaintiff obtained a decree, and it is this decree which we have to construe and execute. The decree is to the following effect (*reads*). This decree of the Court is therefore a decree for the performance of a particular act on the part of the defendants. Such a decree therefore must be executed under the provisions of s. 200 of the Civil Procedure Code, which enacts that, "if the decree be for any specific moveable, or for the performance of any contract, or for the performance of any other particular act, it shall be enforced by the seizure, if practicable, of the specific moveable and the delivery thereof to the party to whom it shall have been adjudged," or as in this case where the decree has been for the performance of a particular act, "by the imprisonment of the party against whom the decree is made, or by attaching his property, and keeping the same under attachment until further order of the Court, or by both imprisonment and attachment if necessary." The lower Appellate Court in its judgment says that the judgment-debtor has for months been able to keep the decree-holder out of his rights by trying every manœuvre possible in the execution department. The Judge then goes on to say that the case has been before his pre-

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decessor twice on appeal, and that, on both occasions, the order of the first Court was upheld. He then animadverts on the conduct of the pleader who appeared before him, and of the Ameen deputed to execute the decree, and he then states that the objections of the debtor had been fully considered by his predecessor, and that the appeal must be dismissed with costs.

In special appeal it is contended that the decree simply ordered the performance of a particular act by the defendant, and that the Courts below had no authority under the decree, and the Procedure Code, to order the destruction of the building by the Nazir of the Court.

We think that this objection must prevail. Under the section the only way in which this decree can be executed is, as already observed, by the imprisonment of the party against whom the decree is made, or by attaching his property, or by both imprisonment and attachment of property, if necessary.

The order of the Judge must therefore be reversed, and this appeal decreed but without costs.

Before Mr. Justice Phear and Mr. Justice Ainslie.

1873
Jan. 17.

IN THE MATTER OF THE PETITION OF RAMKISHORE SEIN.*

Criminal Procedure Code (Act XXV of 1861), ss. 183 & 184—Time for Appearance of Person against whom Proclamation issued—Appearance after Time fixed—Confiscation after appearance,

THE Magistrate of Maldah had issued a warrant of arrest upon a charge of forgery against the petitioner which proved infructuous. On the 8th November, the Magistrate issued a proclamation under s. 183 of the Criminal Procedure Code for his appearance on the 10th December, and at the same time attached his property under s. 184. The proclamation was read at Khurba, at which place the petitioner did not reside; he surrendered, however, on the 19th December. He was then committed to *hajat*, and remanded from time to time without further evidence being adduced in support of the charge against him. On appeal the High Court, on the 27th April, annulled the last order of remand, declaring that "there was not any evidence taken which could be made the foundation of a charge," and the petitioner was accordingly discharged on the 18th May. He then applied to the Magistrate for the removal of the order of attachment against his property, but his application was refused, and the attached property declared to be at the disposal of Government. The present appeal was then brought. The facts of the case appear fully in the judgment of "hear, J.,

* Miscellaneous Criminal Case, No. 229 of 1872.

Mr. Woodroffe (with him Baboo Ishur Okunder Chuckerbutty) for the petitioner contended, that there was no legal evidence of his having absconded or concealed himself for the purpose of avoiding the service of the warrant, and even if there was, it did not appear that the Magistrate had satisfied himself that such was the fact,—see *Shewdyal Sing v. Griban Sing* (1). The proceedings show that, if there was any service, it was in a village other than that in which the accused resided. The proclamation was made neither in the proper place, nor with the formalities required by s. 183 of the Criminal Procedure Code. Even if the proclamation had been duly made, sufficient time was not given to the accused for appearance; the thirty days must count from the time when the proclamation was notified, and not from the date of issue of the order. Moreover, the whole procedure provided by s. 183 being simply to obtain the attendance of the accused, in whatever way the thirty days are to be counted, the petitioner having surrendered, the procedure could no longer be put in force—*In the matter of the Petition of Jhundoo Sing* (2). Nor order having been made putting the property at the disposal of Government at the time when the proclamation was made, the subsequent order was illegal. Lastly, the magistrate ought to have taken evidence before attaching the property—*Queen v. Abdul Sitar* (3).

Baboo Juggodanund Mookerjee, the Junior Government Pleader on behalf of Government, contended that the Court ought not to interfere. The petitioner should have applied under s. 185 of the Criminal Procedure Code for the restoration of his property.

The judgment of the Court was delivered by.

PHEAR, J.—It appears to me that the matter brought before us on this petition has been a most unfortunate one at every stage. Irregularity is apparent on the proceedings at almost every step in the case.

In April 1871, the Magistrate of Maldah, after taking the deposition of one Heera Lall Dass, issued a warrant of arrest, upon a charge of forgery, against five persons, including Ramkishore Sein, the present petitioner. This warrant was infructuous; and on 8th November, six months afterwards, the Police officer charged with its execution, made a deposition before the Magistrate, upon which the Magistrate passed this order:—"It is ordered under ss. 183 and 184 of Act VIII of 1869 that proclamation be issued calling on these five persons above-mentioned to appear in my Court on or before 18th December 1871, and that all their moveable and immoveable property be attached under s. 184." On the same day, a proclamation was drawn up by the mohurrir of the Court, and signed by the Magistrate, requiring Ramkishore Sein amongst others to appear in the Magistrate's Court on the 10th

(1) 6 W. R., Cr. R., 73. (2) 5 W. R., Cr. R., 8. (3) 3 W. R., Cr. R., 35.

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December. There is an endorsement on the proclamation to this effect :—
“ This proclamation is forwarded to the Police officer of division Khurba for service.” This is dated the 10th November 1871, and signed “ Kally Dass Biswas, Court sub-inspector.” Then comes a second endorsement :—“ For-
warded to head constable Tincowry Khan for service. Dated 13th November 1871, signed Madhub Chunder Sanyal, head constable, station Khurba.” A third endorsement is received in the mofussil on the 14th November 1871, signed A. Woodeen, head constable. A fourth endorsement runs thus :—
HONORED SIR,—On receipt of this proclamation, your humble servant proceeded to the spot, affixed the duplicate at a conspicuous place, and informed the heirs of the defendants. The three *kyfuts* of the neighbours regarding the same are herewith submitted. Dated the 23rd November 1871, signed by Tincowry Khan, head constable, station Khurba.” The fifth, and I believe last, endorsement is :—“ HONORED SIR,—I beg to submit the accompanying papers sent in by head constable, Tincowry Khan, signed Madhub Chunder Sanyal, head constable.”

This somewhat remarkable set of endorsements constitutes all the existing evidence relative to the fact of publication of the proclamation. It refers, as far as I can gather, to publication at Khurba only; and is silent as to any sort of publication at Raipore, the place where the petitioner resides, and the place to which the proclamation itself described him as belonging.

The petitioner did not surrender himself before the 10th December. But he did in fact surrender himself, together with two others of the five accused persons, on the 19th December. He was then committed to *kajut*. Afterwards, from time to time, the petitioner was brought up before the Magistrate and as often remanded, although no evidence had been taken since the date on which the Magistrate originally issued the warrant of arrest. And this continued until the 27th April 1872, when the petitioner and the two other prisoners applied to the High Court for relief. A Division Bench consisting of the Chief Justice and Ainslie, J., heard the matter, and the Chief Justice, in giving judgment, stated :—“ There was not any evidence taken which could be made the foundation of a charge; and the Magistrate appears to have been influenced in the course which he took by the expectation that, after some time and by dint of enquiry, some evidence might be obtained.” The High Court, therefore, made the order that the last order of remand, namely, that of the 26th February, should be annulled. The consequence of this order was, I believe, that the petitioner and the others were discharged on the 18th May.

In the July following, the petitioner applied to the Magistrate to have the order of attachment, which had been put upon his property simultaneously with the issue of the proclamation on the 8th November, removed. On that application the Magistrate said :—“ Under all these circumstances I see no reason why the provision of the law as to this attached property, being at the disposal of Government, should not be carried out, and I order accordingly.”

It thus appears that, while the petitioner is a free man, with no charge in fact hanging over his head, simply because, as the Chief Justice phrased it, no evidence has been found to support the original charge made against him, yet as much of his property as could be got at by the Magistrate is, by an order passed by the Magistrate since the petitioner's own release, forfeited to Government. It seems to me that this certainly is a startling state of things to say the least, and very strong grounds are needed in my judgment to prove that it is right.

The Government pleader has urged upon us that we should not at this stage interfere in the matter, because it is still open to the petitioner to apply under s. 185 of the Criminal Procedure Code to have the property restored to him. But as far as I understand the proceedings which have been taken, the application which he made in July last to the Magistrate, was in fact an application to have the benefit of the provisions of that very section, and that application has been refused.

Now, on turning back to the commencement of these proceedings, I may take it as being at this time beyond contest that, in order to lay a sufficient foundation for the issue of a proclamation under s. 183, and the accompanying order of attachment under s. 184, the Magistrate must, upon some sufficient materials, find judicially (that is, by an exercise of judicial discretion applied to the consideration of that material) that the person against whom the proclamation is to be issued had absconded or concealed himself for the purpose of avoiding the service of the warrant of arrest previously issued against him. But in this case, according to the record which has been sent up to us, the Magistrate ordered the proclamation to issue without having previously come to any such finding at all. We have in the official copy of documents laid before us merely a deposition of a certain Mohima Chunder Ghose, Court inspector, followed immediately on the same paper by this order:—"It is ordered under ss. 183 and 184 of Act VIII of 1869 that proclamation be issued calling on these five persons above-mentioned (that is, I suppose mentioned in the deposition) to appear in my Court on or before, &c." It was distinctly held by Norman J., in *Shewdylal Sing v. Griban Sing* (1), that, "before the Magistrate can issue the written proclamation under s. 183, and order the attachment of the property of an accused party who cannot be found, he must be satisfied that such person is absconding or concealing himself for the purpose of avoiding the service of the warrant. The Magistrate should have recorded in his proceedings whether or not he was so satisfied." I entirely take this view, and I think that, until the Magistrate had judicially found as a fact upon sufficient information that the person against whom the proclamation is to issue had absconded or concealed himself for the purpose of avoiding apprehension under the warrant, he had no authority to issue that proclamation. Not only is it the case that no such finding appears to have been come to by the Magistrate.

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(1) 6 W. R., Cr., 73.

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so far as this record speaks, but it seems to me that the deposition of the Court inspector, if stretched to the utmost, could not possibly in reason be made the ground of a conclusion that Ramkishore Sein was in fact evading the service of the warrant. And the recital with which the proclamation commences, assuming that it might properly be taken as evidence of the formal finding of the Magistrate, does not carry the matter further, for it merely says :—"Whereas it has appeared from the deposition on oath of the head constable Baboo Mohima Chunder that the above-named defendants have absconded, this proclamation is issued, &c.," and it stops short of stating that the persons named had absconded for the purpose of evading the Magistrate's warrant.

Thus, it appears to me that in this case the whole foundation for the attachment and confiscation of the property fails. It is, therefore, not, strictly speaking, necessary that I should express an opinion on the other points which have been mooted in this application. I think, however, it is right that I should throw out as my own opinion that the period of 30 days, which is prescribed in s. 183 as the minimum period within which the person is to be required by the proclamation to appear, was intended by the Legislature to run from the date on which the publication in the mode prescribed by the same section should be effected, namely, by reading the proclamation publicly in some conspicuous place of the town or village in which such person usually resides, and by affixing it on some conspicuous part of the ordinary place of abode of such person, or on some conspicuous place of such town or village. If this view be correct, then, inasmuch as we have certainly no evidence at all in this case as to when the proclamation was read in the town or village of Raipore, where, according to the proclamation itself, the petitioner usually resided, or when it was affixed on some conspicuous part of his ordinary place of abode, it would be impossible for us to infer that he did not, by coming in on the 19th December, come in within 30 days from the date of publication of the proclamation if duly effected in that manner, i. e., within the 30 days as limited by the Act. The Magistrate seems to think that the 30 days should be counted from the date of issuing the proclamation. If this were so, then as Mr. Woodroffe very rightly pointed out, the proclamation might get into the hands of some subordinate Court officer, or, even going further than this, into the hands of some local officer for the purpose of being published according to the terms of s. 183, and yet might not in fact become published at all within the period of 30 days. It is manifest that even such a delay as has undoubtedly occurred in this case, namely, the delay involved in the fact that the proclamation was not published anywhere according to the endorsed returns until some day between the 14th and 23rd November, might be a very serious diminution of the period of 30 days, so far as regards the opportunity for learning of the proclamation and returning, which the Legislature professed to afford to the absconding person.

I will further add that the inclination of my opinion is that the declaration

of forfeiture directed to be made in s. 184 was intended to be in furtherance of a matter of procedure, and not simply as a mode of punishment for contempt of process; and in this view I think that, if it is not made before the person affected by the proclamation has come in, or has been brought in, it ought not be made at all. Because by that time its purpose has been effected, though even possibly by other means than that of the process which was evaded.

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It certainly does seem to me that it was a harsh proceeding on the part of the Magistrate to take the opportunity afforded to him by the application made by the petitioner in July for the release of his property, for passing, long after all real occasion for it had gone by, that order of forfeiture which had not been made before during the time when it possibly might have been expected to serve some purpose.

What is the meaning of the proceeding by which the Magistrate bound the petitioner, on the occasion of his making this application in his own behalf, by recognizance to appear from time, to time I have not yet been able to understand. On the face of it, the recognizance does not bind him to meet any criminal charge, and the Government pleader is unable to say whether in fact at that time any criminal charge had been preferred against him or not. The papers which are before us ought to contain all that is pending in the Magistrate's Court upon this matter, and they do not disclose a trace of any other criminal charge having been made against the petitioner than that which was made in April 1871, and which had fallen to the ground in consequence of the order passed by this Court in April 1872, and the petitioner's subsequent release from custody. It seems to me very clear, however, that the attachment and order under s. 184 have been made without sufficient ground in law, and must be set aside.

I regret very much that the proceedings should have shown a continued series of irregularities such as they certainly do show, because I cannot avoid perceiving that these are likely to be interpreted as indicative of personal feeling in an officer, who ought to be looked upon by all, and who no doubt is free from any such bias.

AINSLIE, J.—I think that the order of forfeiture and attachment of the property in this case ought to be set aside on the ground that it has not been shown that the petitioner failed to attend within 30 days of the service of the proclamation issued by the Magistrate under s. 183. The procedure laid down in s. 183 by publicly reading the proclamation in some conspicuous place of the town or village in which the accused person usually resides, and by affixing it on a conspicuous part of the ordinary place of abode of such person, or on some conspicuous place of such town or village, seems to me to indicate that it was the intention of the Legislature that the accused person should have the means of deriving information through his family or friends or in some other indirect way, when the warrant or the direct order to attend

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the Court cannot be served upon him ; and that the Legislature has distinctly determined what shall be considered a sufficient time to allow such indirect notice to reach him and for him to attend the Court in consequence of that notice, that time being 30 days. Unless this was the intention of the Legislature, it may very well happen that the accused person should really have no reason to suppose that any proclamation was being issued. In this very case I find that, from the issue of the warrant to the issue of the proclamation, a very long period expired. If the proclamation had followed immediately on the return to the warrant to the effect that the accused person had absconded, it might be taken as one continuing proceeding for securing the attendance of the accused. But when a long interval is allowed to elapse between the return to the warrant and the issue of the proclamation. I, for my own part cannot see how the accused person, who may have gone to a considerable distance at that time, is to be supposed to know that the proceedings have suddenly been revived against him. In this case the petitioner surrendered on the 19th December, and we do not know on what date between the 14th and the 23rd November the service of the proclamation was effected ; and I do not think that we should be justified in assuming that the petitioner was not within 30 days of the issue of the proclamation when he put in his appearance on the 19th December. It must be understood that I have no intention to express dissent from any of the remarks made by my learned colleague in this case, but I think it is quite sufficient for me to put the order we propose to make upon the ground which I have indicated.

Before Mr. Justice Kemp and Mr. Justice Pontifex.

IN THE MATTER OF THE PETITION OF J. P. WISE AND ANOTHER.*

1873
Feb. 28:

High Courts' Act (24 & 25 Vict., c. 104). s. 15—Claim over-valued for purpose of giving Jurisdiction.

THE petitioners brought a suit under s. 15, Act XIV of 1859, in the Court of the Subordinate Judge of Dacca. The defendant pleaded that the Judge had no jurisdiction, inasmuch as, if the suit had been properly valued, it was one cognizable by the Munsif. The Subordinate Judge found that the value of the property did not exceed Rs. 500, and that the plaintiffs "had over-estimated the value of the claim in order to exceed the jurisdiction ;" but instead of returning the plaint, he proceeded to try the case on its merits, and dismissed the suit.

On the 31st August 1872, Mr. Woodroffe, on behalf of the plaintiffs, obtained a rule calling on the defendants to show cause why this judgment should not be set aside as passed without jurisdiction.

* Rule No. 649 of 1872

Mr. Woodroffe (with him Mr. C. Gregory and Baboos Romesh Chunder Mitter and Nullit Chunder Sen) for the plaintiffs urged, in support of the rule, that the Subordinate Judge had no jurisdiction, he having found that the suit had been over-valued for the purpose of ousting the jurisdiction of the Munsif—*Bonomally Nawn v. Campbell* (1). After such finding, the Subordinate Judge ought to have dismissed the suit instead of proceeding to determine the case on the merits.

Mr. M. M. Ghose (with him Baboos Sreenath Doss, Rash Behary Ghose, Shushee Bhoosun Sen, and Gria Sunkur Mozoomdar) for the defendants was not called upon.

The judgment of the court was delivered by.

KEMP, J.—We think this is a case on which we ought not to exercise the powers vested in us by s. 15 of 24 & 25 Vict., c. 104. (His Lordships, after stating the facts, continued.)—Mr. Wise, who chose his own tribunal, now invokes the aid of this Court under the special powers vested in it by s. 15 of 24 & 25 Vict., c. 104, to set aside the decree passed against him on a technical ground. We think, as already stated, that this is not a case in which we ought to exercise those powers. The rule is discharged with costs.

Before Mr. Justice Kemp and Mr. Justice, Pontifex.

IN THE MATTER OF RAMSOODER BANDOPADHYA.*

1873
February 6.

Bengal Act III of 1870—Decree transferred to the Munsif's Court for Execution

KAMMAL BARRUI brought a suit against Ishwar Barrui and another, in the Court of the Deputy Collector of Gorbetta, for recovery of Rs. 75, or arrears of rent for the years 1273 (1866), 1274 (1867), and 1275 (1868), and obtained an *ex parte* decree on the 18th March 1869. On the 12th October 1871, Kammal Barrui applied to the Munsif for, and sued out execution of his decree. On the 4th January 1872, Ramsooder Bandopadhyia applied to the Deputy Collector of Gorbetta for review of his judgment. The Deputy Collector admitted the review, and dismissed the plaintiff's suit. On appeal the Judge held that the Deputy Collector had no jurisdiction to entertain the application for review or to hear the case, the decree having been transferred under Bengal Act III of 1870 to the Munsif for execution. He accordingly reversed the judgment of the Deputy Collector.

See also
13 B L R 216.

Baboo Greeshchunder Mookerjee for Ramsooder Bandopadhyia moved the High Court (Kemp and Pontifex, J.) for and obtained a rule calling upon Kammal Barrui "to show cause why the order passed by the Judge of Bancoorah, reversing the judgment of the Deputy Collector of Gorbetta

* Rule Nisi 7 of 1872.

(1) *Ante*, p. 193

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should not be set aside upon the ground that the decree was made without jurisdiction.

Baboo *Rajendro Misery* for Kammal Barrui, in showing cause, contended that the appeal lay to the Judge, and not to the Collector. Bengal Act VIII of 1869 gave no power to the Collector to hear appeals from such orders. All appeals are to be preferred to the District Judge. Act X of 1859, s. 155, which authorized the Collector to hear appeals, was not in force at the time when this appeal was preferred. Besides, the Deputy Collector had no jurisdiction to re-hear the case. Under s. 6, Act III of 1870 (of Bengal), the application should have been made to the Munsif to whom the decree had been transferred for execution. This was not an application excepted from the operation of the Act by s. 6, therefore, if it be held that the Judge had no jurisdiction, this Court ought to set aside the order passed by the Deputy Collector as passed without jurisdiction.

Baboo *Greeshchunder Mookerjee* in support of the rule contended that the Deputy Collector had jurisdiction to re-hear the case—*In re Sreemutty Juggodumba Dossee* (1). The suit being for the recovery of arrears of rent below Rs. 100, the appeal does not lie to the Judge, but to the Collector, S. 155, Act X of 1859.

Baboo *Rajendro Misery* in reply.

KEMP, J. (after stating the facts).—The suit was instituted and decided by the Deputy Collector before Bengal Act VIII of 1869 came into operation, the procedure, therefore, under s. 108 of that Act would be that laid down in Act X of 1859, and the appeal would lie to the Collector and not to the Zillah Judge, see ss. 153 and 155 of that Act.

It is also clear that the decree alone was transferred to the Civil Court for the purpose of execution; any application in the suit as to a matter which

(1) *Before Mr. Justice Norman, Offg. Chief Justice, and Mr. Justice Loch.*

IN THE MATTER OF THE PETITION OF SREEMUTTY JUGGODUMBA DOSSEE.

The 23rd January 1871.

Mr. R. T. Allan for the petitioner.

The judgment of the Court was delivered by

NORMAN, J.—It appears to us that there is no ground for our interference in this case. By the conjoint operation of Bengal Acts VIII of 1869 and III of 1870, the decree against the applicant, Sreemutty Juggodumba Dossee, was transferred from the Court of the Deputy Collector to that of the Subordinate Judge of 24-Pergunnahs. The Subordinate Judge, who was executing that decree, made a certain order. The applicant then presented a petition to the Subordinate Judge to review the judgment

of the Deputy Collector, which was passed so long ago as the 16th June 1869. The Judge refused that application, considering that he had no jurisdiction to entertain it; and that, if the petitioner desired to have that decree reviewed, her proper course was to apply to the Deputy Collector.

We think that the Judge was perfectly right. Under s. 3, Act III of 1870, the decree alone was transferred, that is, transferred for the purpose of execution. If there had been any doubt as to the transfer of the suit by the transfer of the decree, that doubt would have been set at rest by the 2nd and 5th sections of Act III of 1870, which show clearly that any application in the suit as to a matter prior to, or which might affect, a decree must be made, not to the Court to which the decree was transferred, but to the Court by which the decree was made. The application is refused.

might affect the decree, such as an application for a re-hearing, had to be made not to the Court to which the decree was transferred, but to the Court by which the decree was made, in this instance, the Deputy Collector; see the case of *In the matter of S. M. Juggodumba Dossee* (1).

We therefore hold, first, that no appeal would lie to the Judge; and, second, that he was wrong in holding that the Deputy Collector had no jurisdiction to re-hear the case.

The rule must be made absolute, and the decision of the Judge dated the 9th of July 1872 quashed.

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Before Mr. Justice Macpherson.

NICHOLAS EDWARD KELLY 'v. MARY HANLON.

1873
Jan. 23 & 27.

Promissory Note endorsed by an Insolvent—Right of Official Assignee to intervene—Act VIII of 1859, s. 73.

THIS suit was brought to recover Rs. 7,000 due on a promissory note, dated the 15th February 1872, made by the defendant, and payable to one Charles Henry Lane, or order. Lane, on the 21st June 1872, endorsed the note to the plaintiff for value. The suit came on for hearing in the first instance as an undefended cause, when it appearing in evidence that Lane had been insolvent, and that the note had been delivered to him and endorsed by him to the plaintiff between the dates of his obtaining his personal and his final discharge. Macpherson, J., directed the suit to stand over for a week, and notice to be given to the Official Assignee. Thereupon, the Official Assignee gave notice of his intention to intervene. His application was supported by an affidavit of Mr. Dignam, his attorney, who stated that the plaint in this suit was filed on the 14th December 1872; that the plaintiff had stated in his evidence that, when the note was endorsed to him, he had paid Lane Rs. 6,000 for it, and that he knew that Lane had been insolvent; that Lane had filed his petition in the Insolvent Court on the 7th September 1871; that on the same day the usual vesting order was made; and that Lane obtained his personal discharge on the 5th November 1871. and an order absolute for his discharge in the nature of a certificate on the 11th January 1873.

Mr. Ingram for the Official Assignee now applied for an order that the suit be adjourned, and the Official Assignee be added as a plaintiff or defendant. The note was not negotiable by delivery. The plaintiff's title depends entirely on the act of an insolvent. If he had recovered the money, he would have recovered it merely for the benefit of Lane's creditors, and we could make him hand over the money as being money received to our use—Byles on Bills, 464. and the cases collected in the note to *Miller v. Race* (2). [MACPHERSON, J.—Kelly was scarcely a *bona fide* purchaser. He admits he knew that Lane had been insolvent.] We now ask for an order under Act VIII of 1859, s. 72.

(1) *Ante*, p. 22.

(2) 1 Smith's L. C., 16th ed., 468.

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Mr. Goodeve for the plaintiff contended that Mr. Dignam's affidavit made no case for the Official Assignee to come in as a party to the suit. A person seeking to intervene under s. 73 must show on his affidavit a clear right to come in, which has not been done here. It does not appear either in the affidavit, or in the evidence, that the plaintiff knew the facts; and he has not been fixed with the knowledge that Lane was insolvent when the note was endorsed. Kelly as *bona fide* endorsee, has a legal right against the defendant, and is entitled to a decree, leaving the Official Assignee to pursue whatever course he pleases—*Braithwaite v. Gardiner* (1). The rights of the Official Assignee will be in no way affected by the plaintiff obtaining a decree. [MACPHERSON, J.—It is rather the question whether it would not be the most convenient course for all parties to add the Official Assignee as a party.] The Court has no power to add the Official Assignee as plaintiff or defendant under s. 73. He claims adversely both to the plaintiff and the defendant, and, therefore, ought not to be added as a party—*Joy Gobind Doss v. Goureesproshad Shaha* (2), *Ahmed Hossein v. Mussamut Khodeja* (3), *Nga Tha Ya v. Mi Khan Mhaw* (4). [MACPHERSON, J.—There are two courses, either of which I may adopt. I may allow a decree to be entered up for the present plaintiff, and not allow execution to issue without notice to the Official Assignee; or I may adjourn the hearing, the Official Assignee undertaking to file a plaint against the defendant.]

Mr. Ingram in reply submitted that the Court ought to dismiss the suit at once. The cases cited by Mr. Goodeve do not apply. The question in *Braithwaite v. Gardiner* (1) was one of estoppel, not of the real owner stepping in and saying that the plaintiff never had any title—*Thomason v. Frere* (5) and *Pinkerton v. Marshall* (6).

Cur. adv. vult.

MACPHERSON, J.—The plaintiff sues as endorsee of a promissory note, made by the defendant in favor of one Lane, who endorsed it to the plaintiff. The promissory note was given to Lane pending his insolvency,—that is to say between the dates of his obtaining his personal and his final discharge; the note, therefore, was the property of the Official Assignee, if he chose to claim it, and not the property of Lane. It is true that so long as the Official Assignee did not interfere or claim the money, the maker of the promissory note was liable to Lane, and Lane or Lane's endorsee for value could sue upon it—*Drayton v. Dale* (7). But it is also equally true that the Official Assignee had a right to intervene, and so defeat the right of the insolvent at any moment: and *Crafton v. Poole* (8) is an authority that the Official Assignee may come in at any moment, even after action brought. *Braithwaite v. Gardiner* (1), on which Mr. Goodeve relied, carries the case

(1) 8 Q. B., 473.

(2) 7 W. R., 202.

(3) 3 B. L. R., A. C., 28, note.

(4) 5 B. L. R., 371.

(5) 10 East., 418.

(6) 2 H. Bl., 334.

(7) 2 B. & C., 293.

(8) 1 B. & Ad., 568.

no further than this, that as between the maker of the note and the insolvent, the maker, having promised to pay the insolvent or order, cannot afterwards dispute the insolvent's right. The decision in *Braithwaite v. Gardiner* (1) does not touch the question as to the right of the Official Assignee to intervene.

It is clear to me that the Official Assignee has a right in some shape or other to intervene in this matter, and prevent the money being lost to the estate of the insolvent. The question is, in what form should he intervene? I might almost say that there is sufficient evidence, as the case now stands, to justify me in adding the Official Assignee as a defendant, and then dismissing the suit, allowing the Official Assignee to raise the defence which the present defendant is estopped from raising. But the better course probably will be to postpone the further hearing of this suit for a month, to enable the Official Assignee to institute a suit upon the promissory note. If the Official Assignee does not institute a suit within a month I shall take it that he does not intend to claim the money, and that he assents to a decree being made in this suit in favor of the plaintiff.

On the facts now before me, there is much reason for believing that the transaction was simply an arrangement to prevent this money from falling in to the Official Assignee's hands.

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Before Mr. Justice Pontifex.

RUSSICKLALL DAY AND OTHERS v. JADUBRAM DAY AND OTHERS.

Security for Costs by Plaintiff residing out of the Jurisdiction of the High Court—Act VIII of 1859, s. 34.

 1873
April 1.

THIS was a suit for the administration of the estate of a deceased Hindu. The plaintiffs resided at Chandernagore, out of the jurisdiction of the High Court, and it was admitted by the defendants that the plaintiffs had a certain interest in the property, the subject matter of the suit; but the extent of that interest was disputed.

Mr. Branson, for the defendants, applied that the plaintiffs might be ordered to furnish security for costs under s. 34 of Act VIII of 1859.

Mr. Evans, for the plaintiffs, was not called upon.

PONTIFEX, J.—The provisions of s. 34 of the Code of Civil Procedure are not intended to apply to a case like the present, where the plaintiffs bring a suit for the administration or partition of property in which, as is admitted by the defendants, they are entitled to a share, the extent of such share being in dispute. The motion must be dismissed with costs.

(1) 8 Q. B., 473,

Before Mr. Justice Phear and Mr. Justice Ainalis.

IN THE MATTER OF THE PETITION OF RAGHOO PARIRAH*

1873
January 28. Criminal Procedure Code (Act XXV of 1861), s. 67 (1)—Complaint—Dismissal without Enquiry.

REFERENCE by the Sessions Judge of Cuttack under the following circumstances :—

One Raghoo Parirah, on the 5th November 1872, presented a petition to the District Magistrate, alleging that he had been maltreated by the Police, and asking for an enquiry. The deposition of the complainant did not appear to have been taken, nor was there any record of any enquiry having been made. The petition was ordered to be filed, but no further order was made in the case. Accordingly the complainant, on the Magistrate going into camp, presented a second petition on the 20th November to the Joint Magistrate in charge. He made no mention of his former petition. The Joint Magistrate after taking the complainant's deposition, fixed the 26th November for the trial of the case, and issued warrants against the accused. The District Magistrate being informed of this, at once transferred the case to his own file, and directed the suspension of the warrants, and on the 3rd December he dismissed the complaint under section 67 of the Criminal Procedure Code, observing that, after an enquiry made by him in his executive capacity, he was satisfied that the Police had only acted in the discharge of their duty, and were therefore protected by ss. 76 and 77 of the Code.

The Sessions Judge being of opinion that the complaint had been improperly dismissed, referred the matter for the orders of the High Court.

The judgment of the Court was delivered by

PHEAR, J.—It appears that the Magistrate removed a case from the file of the Joint Magistrate to his own, after complaint had been made and warrants issued by the Joint Magistrate upon the footing of the complaint. The Magistrate having removed the case immediately suspended the warrants and dismissed the complaint, on the ground that he had previously, in his executive capacity, made some enquiry into the matter out of which the complaint arose, and from information that he so gained was of opinion that the complaint ought to be rejected under section 67 of the Criminal Procedure Code. The words of this section are, so far as it is necessary to read it now—"If in the judgment of the Magistrate there be no sufficient ground for proceeding, he shall dismiss the complaint."

*Reference to the High Court under section 434 of the Code of Criminal Procedure, by the Sessions Judge of Cuttack.

(1) See Act X of 1872, s. 147.

We think that the Magistrate committed an error in taking this course. It has always been held by this Court that the proper officer to issue the warrant is the officer who has heard the complaint made, because it is he who can best exercise a discretion with regard to the *prima facie* merits of the complaint. When that officer had issued the warrants the case ought to go on in due course according to the procedure prescribed by the Code, unless something occurs to show that the Magistrate who had issued the warrant had from some cause or another made a wrong exercise of his discretion, which has certainly not been the case here. It appears to me that when the Magistrate took the case from the Joint Magistrate's file, he ought to have proceeded with it as from the stage at which he found it; and I think he committed a material error by not doing so. In my opinion therefore the order of the Magistrate which suspended the warrants and dismissed the complaint should be set aside.

I do not think it necessary that we should transfer the case to any other Magistrate for complete investigation and decision, because I feel confident that the Magistrate whose order is now in question, when he is made acquainted with the opinion of this Court, will duly carry out the investigation which the complaint initiated, and will come to a fair and judicious determination of the matter.

Before Mr. Justice Macpherson.

IN RE EDULJEE RUTTONJEE.

Act VIII of 1859, ss. 280, 281 — Plaintiff.

S. 281 of Act VIII of 1859 does not apply to a plaintiff in custody for the cost of a suit.

THIS was an application under s. 281 of Act VIII of 1859 for the release of a prisoner confined in the Presidency Jail, who was in custody at the suit of the defendant for the costs of a suit in which he had been unsuccessful. The terms of s. 280 had been complied with by the prisoner.

Mr. Kennedy, in support of the application, contended, that s. 281 applied to this case; that the words of the section applied, as laid down by s. 280, to "any person in confinement under a decree;" and therefore would apply to a plaintiff-debtor, as well as a defendant-debtor.

Mr. Woodroffe, *contra*, referred to a decision by Levinge, J., in *In the matter of Beenarussee Dossee* (1).

Mr. Kennedy, in reply.

MACPHERSON, J.—I shall follow the decision of Levinge, J., that s. 281 does not apply to such case as this. The application is dismissed with costs.

(1) Cor. Rep., 123.

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IN THE
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THE PETITION
OF RAGHOO
PARIAH.

1873
March. 4.

Before Mr. Justice L. S. Jackson and Mr. Justice Miller.

1873
Feb'y. 11.

CHUNDER NATH MISSER AND ANOTHER (DECREE-HOLDERS) v. GOUREE
KOMUL BHUTTACHARJEE (JUDGMENT-DEBTOR).*

Execution of Decree—Agreement to receive Payment by Instalments.

On the 12th March 1867, Chunder Nath Misser and another obtained a decree against Nilcomul Bhattacharjee and others for payment of a certain sum of money. In September 1869, the property of the judgment-debtor was attached and advertized for sale. On the 18th September 1869, the judgment-debtors paid Rs. 1,000, and upon the consent of the decree-holders, the proceedings were struck off the file. On the 21st of June 1870, the decree-holders again applied for execution, and cause the property of the judgment-debtors to be attached. On the 16th December 1870, an arrangement was entered into between the judgment-debtors and the decree-holders, upon which the judgment-debtors paid Rs. 1,000 in part satisfaction of the decree and agreed to pay the balance by monthly instalments of Rs. 125, with interest at 12 per cent *per annum*, and accordingly a petition containing the terms of the arrangement with the consent of the decree-holders was presented to the Court. On the 13th May 1872 the decree-holders applied for execution for recovery of the balance due upon the decree after deducting the amount which had been received under the arrangement of 16th December 1870.

The Judge found that the judgment-debtors had faithfully acted up to the terms of the arrangement of 16th December 1870, and held that, under the circumstances, the decree-holders were not entitled to cancel the agreement. He accordingly rejected the application.

The decree-holders appealed to the High Court.

Baboo Kalimohan Doss and Rashbehary Ghose, for the appellants, contended that the subsequent arrangement entered into between the judgment-debtors and the decree-holders could not vary or alter the decree passed in the case—*Krishna Kamal Sing v. Hiru Sirdar* (1). The decree would be barred by lapse of time, if no execution be allowed to issue. If the judgment-debtors withhold payment of the monthly instalments, no process of execution will be allowed to issue for recovery of the instalments, as more than three years have elapsed since the case was struck off in 1869. The decree-holders were not bound by the agreement, as it was entered into without any consideration.

Baboo Nulit Chunder Sen, for the respondents, was not called upon.

* Miscellaneous Regular Appeal, No. 287 of 1872, from an order of the Judge of Tipperah, dated the 31st July 1872.

(1) 4 B. L. R., F. B., 101.

The judgment of the Court was delivered by

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JACKSON, J.—The appellants in this case held a decree against the judgment-debtors. Various applications were made to execute the decree, and on one of them, in September 1869, the sum of Rs. 1,000 was paid. Further applications were afterwards made, on which finally, on the 16th December 1870, it was arranged upon the petition of the judgment debtors and the consent of the decree-holders that a further payment of Rs. 1,000 down should be made, and that the residue of the debt should be paid with interest at the rate of 1 per cent. per month by monthly instalments of Rs. 125.

The judgment-creditors now seek to set aside the arrangement entered into by mutual agreement, and to execute their original decree as if no such arrangement had been made. The sole ground on which they make this application is that, adverting to the decision of the Full Bench of this Court in *Krishna Kamal Sing v. Hira Sirdas* (1), the agreement would expose them to certain consequences, viz., the risk of incurring limitation, to which if they had been more prudent, they would not have exposed themselves. It appears to me that this is not a ground upon which the Court executing the decree can be called upon to relieve the appellants from their solemn deliberate agreement. The parties were quite at liberty to enter into such an agreement if they thought fit. There was nothing in law to prevent their doing so. Even if it were in the power of the Court in execution proceedings to do that which is sought of it, there must be something much stronger than the mere want of complete prudence or fore-thought on the part of one of the parties to induce it to do so. I think therefore that the Judge of the Court below was quite right in refusing to allow the decree to be enforced in supersession of such agreement.

The appeal is dismissed. We make no order as to costs.

Before Mr. Justice L. S. Jackson and Mr. Justice Mitter.

MOONSHEE MAHOMED MUNOOR MEA (PLAINTIFF) v. SREEMUTTY
JYBUNEE AND ANOTHER (DEFENDANTS).*

1873
Feb'y. 26.

Bengal Act VIII of 1869, s. 102.

In suits for recovery of rent below Rs. 100, a special appeal lies to the High Court from the decision in appeal by a Subordinate Judge.

See also
13 B L R 376

This was a suit for recovery of Rs. 47-12, being the arrears of rent of 2 *kanees* of land in Banini for the year 1275 (1868-69).

The defence was (*inter alia*) that the rent was Rs. 14 only; that Rs. 12 had been paid to the plaintiff, and there was due to the plaintiff Rs. 2 only.

* Special Appeal, No. 301 of 1872, from a decree of the Subordinate Judge of Tipperah, dated the 15th September 1871, reversing a decree of the Moonsif of that district, dated the 15th December 1870.

(1) 4 B. L. R., F. B., 101.

1873

The Munsif passed a decree in favor of the plaintiff for Rs. 2, and dismissed the claim for the balance.

MEONSHEE
MAHOMED
MUNOOR MEA
v.
SEENMUTTY
JYDNEE.

The plaintiff appealed to the Judge. The appeal was heard by the Subordinate Judge, who confirmed the judgment of the lower Court.

The plaintiff appealed to the High Court,

Baboo *Srinath Banerjee* for the respondents took a preliminary objection to the hearing of the appeal, on the ground that, as the suit was for recovery of rent below Rs. 100, and as it did not involve any question of title, no special appeal lay to the High Court under s. 102, Bengal Act VIII of 1869.

Baboo *Woomas Khunder Banerjee* for the appellant was not called upon.

The judgment of the Court was delivered by

JACKSON, J.—The respondent in this case preferred a preliminary objection that the appeal is taken away by s. 102 of Bengal Act VIII of 1869. That section only relates to suits tried and decided originally or in appeal by the District Judge. The present case has been tried and decided not by the District Judge, but by the Subordinate Judge. The objection taken therefore fails.

Before Mr. Justice L. S. Jackson and Mr. Justice Mitter.

NOBOKISTO KOONDO (PLAINTIFF) v. NAZIR MAHOMED SHEIKH
AND OTHERS (DEFENDANTS).*

1873

Feb. 27.

Bengal Act VIII of 1869, s. 102—Appeal to the High Court.

In a suit for arrears of rent below Rs. 100, an appeal lies to the High Court from a decree passed in appeal by an Additional Judge.

THIS was a suit for recovery of Rs. 71-6, being the arrears of rent for the years 1273 (1866) to 1276 (1869).

The defence was that the rent was at the rate of Rs. 11-6 *per annum*, and that the whole amount had been paid.

The Munsif found that the rent was at the rate of Rs. 14-8 *per annum*; that the defendants had failed to prove their alleged payment; and that there was due from the defendants to the plaintiff the sum of Rs. 71-6. He accordingly passed a decree in favor of the plaintiff.

One of the defendants appealed to the Judge.

The appeal was heard by the Additional Judge of Jessore, who found that the rent was at the rate of Rs. 11-6 *per annum*, but that the alleged payment had not been proved. He accordingly modified the decree of the lower Court.

The plaintiff appealed to the High Court.

Baboo *Mohender Nath Mitter* for the respondents took a preliminary objection to the hearing of the appeal, on the ground that, as the suit was for

* Special Appeal, No. 355 of 1872, from a decree of the Additional Judge of Jessore, dated the 26th September 1871, modifying a decree of the Munsif of that district, dated the 28th November 1870.

recovery of arrears of rent below Rs. 100, and as the appeal had been heard by the Additional Judge, no special appeal lay to the High Court under s. 102, Bengal Act VIII of 1869. An Additional Judge is a District Judge under the Civil Courts' Act (VI of 1871), s. 7, consequently no appeal lies to the High Court.

Baboo *Bunseedhur Sen* for the appellant was not called upon.

The judgment of the Court was delivered by

JACKSON, J.—There was a preliminary objection in this case that no special appeal lay under s. 102 of Bengal Act VIII of 1869. That section only refers to cases tried and decided by a District Judge. This case has been tried and decided by the Additional Judge.

Before Mr. Justice Pontifex.

SHAZADA MAHOMED SHAHABOODEEN v. DANIEL WEDGEBERRY.

Evidence Act (I of 1872), ss. 74 and 77—Proceedings between the same Parties in another Suit—Public Documents—Plaint—Written Statement—Judgment.

1873
April 1 & 3,

THIS was a suit arising out of an alleged trespass to a certain drain which was stated by the plaintiff to be his property. The present defendant had, previous to this, instituted a suit in the Munsif's Court of the 24 Pergunnahs against the present plaintiff, on account of an alleged trespass to the same drain, which drain the then plaintiff stated to be his property; the Munsif dismissed the suit on the ground that the plaintiff had not proved his title to the drain in question.

Mr. *Kennedy* and Mr. *Phillips* for the plaintiff.

Mr. *Lowe* and Mr. *Evans* for the defendant.

Mr. *Kennedy* tendered in evidence the judgment of the Munsif, and submitted it would be an estoppel, or at any rate it would be admissible in evidence.

PONTIFEX, J., admitted the judgment, but doubted if it would be an estoppel.

Mr. *Phillips* at a later stage in the suit produced certified copies of the plaint, of the written statement of the defendant, and of the decree, in the suit in the Munsif's Court, and contended that they were public documents and admissible in evidence under ss. 74 and 77 of the Evidence Act.

Mr. *Lowe* objected. The written statement is admissible under no circumstances, and the plaint is a mere copy.

Mr. *Phillips* maintained that the certified copy of the plaint was admissible under s. 77 of the Evidence Act, and that the written statement would show what the issues were between parties, and ought, therefore, to be admitted.

PONTIFEX, J., admitted the plaint, but rejected the written statement.

Before Mr. Justice Phear and Mr. Justice Ainslie.

1873
March 1.

**SHEIKH WALLAH ALLEE AND OTHERS (PLAINTIFFS) v. SHEIKH
GOLAM GOUS (DEFENDANT).***

Landlord and Tenant Ejection of a Ryot—Onus Probandi.

THIS was a suit to recover possession of 1 beegah and 7 cottahs of land in Mouzah Lutchnowtab, on the ground that the former ticcadar of the mouzah had granted a lease to the defendant for a period of seven years, and that the period had expired. The defendant set up in his written statement that he did not hold the land under any lease from the former ticcadar; that he was a kudeemee ryot, and held under the jumma bundee; that he could not now be ousted; and that the kabuliat filed by the plaintiffs was a fabrication.

The Munsiff found that the kabuliat was not proved, but that the defendant had failed to prove his right of occupancy, and held that, when the defendant's right of occupancy was not proved, the plaintiffs were entitled to possession. He accordingly passed a decree in favor of the plaintiffs.

On appeal, the Judge held that, as the plaintiffs had failed to prove the kabuliat, they were not entitled to recover possession. He, accordingly, dismissed the plaintiffs' suit.

The plaintiffs appealed to the High Court.

Baboos *Moheshchunder Chowdhry* and *Gopaul Chunder Mookerjee* for the appellants.

Moonshee *Mahomed Yusoof* for the respondent.

Baboos *Moheshchunder Chowdhry* for the appellants contended that, when the relation of landlord and tenant is admitted, and the defendant has failed to prove his right of occupancy, the plaintiffs are entitled to recover. The defendant having admitted the plaintiffs to be the landlords, the onus is on him to prove that he is entitled to retain possession. [PHEAR, J.—What if the defendant had said nothing?] Then, if the plaintiffs could prove that they were the owners of the land, it would be sufficient to entitle them to recover possession—*Ramdhan Khan v. Haradhan Paramanick* (1). [PHEAR, J.—The material allegation in the plaint is that the defendant is a tenant, but that his tenancy has expired.] The plaintiffs have an undisputed right to the land, and the non-existence of any right in the defendant to oppose their entry would be sufficient to entitle them to recover—*Raja Sahib Prahlad Sen v. Ba'oo Budhu Sing* (2)

* Special Appeal, No. 518 of 1872, from a decree of the Judge of Sarun, dated the 30th December 1871, reversing a decree of the Munsiff of that district, dated the 16th June 1871.

(1) 9 B. L. R., 107, note.

(2) 2 B. L. R., P. C., 111.

Moonshee Mahomed Yusoof for the respondent was not called upon.

The judgment of the Court was delivered by

1873

SHEIKH WAL-
LAK ALLEE
V.
SHEIKH
GOLAM GOUS,

"HEAR, J.—It appears to us that the decision of the Court below is correct. The plaintiffs sue to eject the ryot from his holding admitting that he is a ryot but alleging that he held only for a limited term of years under a potta, and that that term had come to an end. The defendant totally denies having given the kabuliat which the plaintiffs state that he had given and sets up that he had acquired a right of occupancy. It appears that the plaintiffs failed to prove the kabuliat; and on that ground the lower Appellate Court has come to the conclusion that the plaintiffs' claim fails.

It has been urged before us very forcibly that the defendant also failed to prove his right of occupancy, and that because he had set up this right against the plaintiffs' claim, and had failed to prove it, therefore the plaintiffs were entitled to recover immediate possession of the land. It appears to me that there is no authority for this position. Neither the case of *Ram-dhen Khan v. Haradhan Paramanick* (1), nor *Raja Sahib Pahlad Sen v. Baboo Budhu Sing* (2), seems to be in point. It is nowhere, as far as I know, laid down that a zemindar coming into Court and admitting that the defendant has been his tenant can succeed in ejecting him upon any other ground than that the period of tenancy has elapsed, or in some way terminated. The plaintiffs here only sought to prove one mode of termination of the tenancy, and in that they failed. It seems to me that there is nothing whatever in the case to afford even a suggestion in favor of the plaintiffs upon any other ground. The defence set up was not such as to relieve them from the obligation of proving their case because it admitted the tenancy. I think the appeal must be dismissed with costs.

Before Mr. Justice Phear and Mr. Justice Glover:

1873
April 18.

NEPOOR AURUT v. JURAI.*

Maintenance, Order for—Criminal Procedure Code (Act X of 1872), ss. 536, 537—Mahomedan Law—Divorce.

THE following case was referred under s. 296 of the Code of Criminal Procedure by the Magistrate of Pubna:—

"Nepoor Aurut prayed for and obtained an order for maintenance, on the 18th May 1872, in the Court of a full-powered Magistrate, Moulvie Amiruddin, who at that time declared that the plea of divorce set up by the husband had not been proved.

"On the 20th June following, the woman petitioned saying, that the husband had failed to carry out the orders of the Court, and the case was made over

* Reference under s. 296 of the code of Criminal Procedure by the Magistrate of Pubna.

(1) 9 B. L. R., 107, note.

(2) 2 B. L. R., P. C., 111.

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to Moulvie Abdool Karim for needful orders with regard to the realization of the money due. On the 23rd July the Moulvie declared that, as the husband had divorced his wife, she was not entitled to maintenance, and that maintenance for the child could only be granted till he was 2½ years of age. This order has only lately come to my knowledge, and I called on the Moulvi for any explanation he might wish to make. In his explanation he has stated his views, but as it seems to me they are erroneous, and his order contrary to law, I forward the records for the perusal of the Court.

"In the first place, the case was sent to the Moulvi for realization of the money, and not for enquiry into any objections raised by the man on any subject not connected with payments already made; secondly, even had the Deputy Magistrate been authorized to enquire into any objections filed, it was not within his power to decide on the question of the alleged divorce, inasmuch as that had been already disposed of by a competent Court.

"The Deputy Magistrate in his explanation states that he did not look to the divorce alleged to have taken place previous to the order of Moulvi Amiruddin, but to that which the husband in his presence gave to the woman, and which, according to the Mussulman law, was good and sufficient, and amounted to a change of circumstances which authorized a fresh order from him."

The judgment of the Court was delivered by

PHEAR, J.—It does not appear very clear upon the the papers which have come up to us in this reference what precisely was the order that was made by the Deputy Magistrate on the second occasion. We understand that an order for maintenance under the legislative provisions, which are found in s. 536 of the existing Criminal Procedure Code, was originally made, and that it came before the Deputy Magistrate for the purposes of being enforced. It appears from the Deputy Magistrate's letter of explanation that he called the husband before him to show cause why the order should not be enforced, and that the husband thereupon, in his presence, divorced his wife. And we cannot gather from the Deputy Magistrate's statement what course he took at this stage. He tells us that he considered the divorce so effected by the husband was sufficient to relieve the husband from the Duty of compliance with the order of maintenance. As I have already said, however, the Deputy Magistrate does not state in words what formal order he passed. Now, it is clear I think that, as long as any order duly made under s. 536, or its former equivalent, is existing unaltered by any subsequent proceeding, it is operative, and it would be the duty of the Deputy Magistrate, when called upon by the wife in whose favor the order was made, to enforce it. The following section, 537, provides a mode in which the person against whom the order is made can, upon a change of circumstances, get that order altered. And it seems to me probable that, upon the facts stated by the Deputy Magistrate, when the husband in his presence divorced his wife, such an alteration of circumstances

did occur which would justify the Deputy Magistrate upon the application of the husband in altering the order for maintenance in favor of the wife.

At the same time it appears to me quite clear that that change of circumstance, even if it were such as to justify the withdrawal of the order of maintenance against the wife altogether, would not relieve the husband from the necessity of obedience to the order during the time which had elapsed up to the date when and until that change of circumstance had occurred; in other words, that the husband was at any rate strictly bound to pay the maintenance-money according to the terms of the order up to the date when in the Magistrate's presence he divorced his wife, as the Deputy Magistrate says he did.

With these remarks, which may serve as some guidance to the Deputy Magistrate, we direct that the record be returned to him, in order that he may take the requisite steps in the matter and pass the proper orders.

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v.
JURAL.

Before Mr. Justice Macpherson,

MODOOSOODUN PAUL v. DOYAL CHUND MULLICK,

1873
May 15.

Suit on Decree of Calcutta Small Cause Court—Costs.

THIS was a suit to recover Rs. 777-8, due under a judgment and decree of the Calcutta Court of Small Causes, which had been obtained by the plaintiff against the defendant, as executor of the estate of Cowar Cally Coomar Mullick Roy, deceased. The defendant had appeared in the suit in the Small Cause Court, and had denied assets of the deceased; and the decree was wholly unsatisfied as appeared by the certificate of the first Judge. The plaintiff alleged and proved by the evidence of the defendant himself that the latter was in possession of immoveable property belonging to the deceased out of which the plaintiff's claim could be satisfied.

The plaintiff prayed that the defendant as such executor might be decreed to pay to him the amount due under the decree of the Small Cause Court together with interest thereon and the costs of the present suit, and if the defendant should deny assets, for the administration of the estate of the deceased.

Mr. Lowe for the plaintiff.

The defendant did not enter appearance, but was called as a witness on behalf of the plaintiff.

MACPHERSON, J., granted a decree for the sum claimed, with interest from the date of decree at the rate of 6 per cent. and costs on scale No. 1. In default of payment for six months from date of decree, the estate to be administered in due course.

Attorney for the plaintiff: Baboo G. C. Chunder.

Before Mr. Justice Kemp, and Mr. Justice Phear.

THE QUEEN *v.* RAJCOOMAR BOSE.*

1873
April, 29 & 30

Charge of a Judge to a Jury—How to sum up the Evidence—Verdict of Jury—Criminal Procedure Code (Act X of 1872), ss. 255 & 256.

See also
12 B L R 254

Mr. Ghose (Bahoo Beprodass Mookerjee with him) for the prisoner.

THE facts of this case and the arguments appear from the judgments of the Court :—

KEMP, J.—The prisoner, the Deputy Postmaster of Buggolah, in Zillah Nuddea, was suspended on the 2nd of May 1872. It appears that the reason of his suspension was that he had reason to find fault with a subordinate of the name of Jullodhur, and recommended his removal. His immediate superior wished to reinstate Jullodhur, but Rajcoomar Bose, the prisoner, objected to this, and this conduct on his part was considered to amount to insubordination and led to his suspension. Subsequently to his suspension, his successor, on taking charge of the Post Office of Buggolah, found that the cash balance in his hands amounted to Rs. 57. Of this sum the prisoner accounted for Rs. 2, and said with reference to the balance of Rs. 55 that it had been expended by him partly in keeping up a boat during the inundation of 1871, and partly in paying the wages of a railway peon of the name of Sreesah Chunder Pal. An explanation was called for from the prisoner Rajcoomar Bose, which he submitted in great detail to the Post Office authorities. In this explanation he makes the same statement with reference to the Rs. 55 cash balance that he now makes before the Sessions Judge. The Post Office authorities, not deeming that explanation altogether satisfactory, directed the Inspecting Postmaster, who has been examined in this case, to prosecute Rajcoomar Bose. The charges against Rajcoomar Bose are under s. 409 of the Penal Code of criminal misappropriation of moneys which were in his charge in his capacity as a public servant. The Deputy Magistrate framed the charge under one head, but the Sessions Judge, for some reason which we do not quite understand, thought proper to split it up into three separate and distinct charges. The case was tried with the aid of a jury, and they convicted the prisoner under s. 409. The Sessions Judge has sentenced him to five years' rigorous imprisonment. The main grounds of the appeal are that the Judge has misdirected the jury, and that his summing-up is one-sided; that he has omitted to point out to the jury the evidence and points in favor of the prisoner, that he has omitted to point out to them the enmity which admittedly existed between the principal witness Jullodhur and the prisoner, that with reference to the alleged alteration of the date in the letter, which is marked J in the book, he

* Criminal Appeal, No. 296 of 1873, from an order of the District Judge of Nuddeah, dated the 17th February 1873.

ought to have pointed out to the jury that the prisoner's case was that the letter in question was despatched in September; that there was no reason why the prisoner should alter the date from September to October, while the body of the letter remained unaltered, which conclusively shows that the letter was despatched in September, and not in October; and further, that the prisoner could have had no control whatever over that letter-book, inasmuch as from the date of his suspension in May 1872, to the date of his trial, many months after, it was never in his custody. Then it is urged that the Judge entirely omitted to draw the attention of the jury to the fact that the prisoner's case was not that he contracted with the boatmen directly with reference to the hire of the boat during the inundation, but that the contract was made with Jullodhur, and therefore the Judge was wrong in prominently calling the attention of the jury to the fact that the prisoner, instead of paying the boatmen, had paid Jullodhur, and directing them to take that circumstance into consideration as evidence against the prisoner. Then, and this is the most important error in the summing up, and by which undoubtedly the Judge has misdirected the jury in a most important part of the case, inasmuch as the Judge has directed the jury to hold as conclusive evidence against the prisoner, the fact that the books which are admitted by him show that in January there was no such sum amounting to Rs. 40 as cash balance from which the prisoner could have paid the witness Jullodhur, as stated by him; whereas, on referring to these books, it appears that up to January there was a balance of Rs. 43. There are other minor omissions pointed out by the prisoner in the petition of appeal, but we think it sufficient for the purposes of this judgment to notice the principal ones which have been stated above. The petition winds up with a statement that the sentence of five years' rigorous imprisonment is too severe with reference to the prisoner's youth, and on turning to the answer of the prisoner, we find that he is a young man of the age of 21.

Now in this case, undoubtedly, the summing-up of the Judge is very defective, and he has in one or two instances, and notably in the instance of the cash balance book, altogether misdirected the jury. The jury in this case have not been intelligently guided by the Judge, evidence has been placed before them, which ought not to have been placed before them, and deductions have been drawn from facts which do not exist. The style of the charge also appears to us to be very objectionable. The jury are repeatedly called upon in the following terms:—"Do you believe this?" "Can you believe that?", instead of leaving them to judge of the evidence and to decide what weight is to be attached to it.

Now it is not in every case in which there has been a misdirection to the jury that this Court will set aside a verdict of guilty, but only in such cases in which the accused has been materially prejudiced, or where there has been a failure of justice. In other words, if this case had been tried with the aid of assessors, and this Court on appeal, after reading the whole of the evidence,

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should come to the opinion that the verdict was not warranted by the evidence, this Court would be justified, under the ruling to be found in the case of *Queen v. Elahi Bas* (1), to set said the verdict, to direct the discharge of the prisoner, and not to direct any fresh trial. In this case I have very carefully gone through the evidence, and I think that the prisoner is on that evidence entitled to an acquittal. (The learned Judge proceeded to examine the evidence and continued :—) on the whole case, therefore, if this had been a trial with the aid of the assessors instead of a trial by jury, we should not think it right to convict the prisoner upon this evidence. We, therefore, do not direct a fresh trial, but direct that the prisoner be discharged.

PHEAR, J.—I entirely concur in all that has fallen from my learned colleague, Kemp, J., but I think that, under the circumstances of the case, it may be as well if I add a few words, inasmuch as it very constantly devolves upon me to conduct trials by jury, and it seems to me, judging by the aid of my own experience, that in one particular at any rate the trial of this case in the Sessions Court has not been exactly what the law contemplates. It seems to me that the Judge's charge to the jury was not a summing-up of the evidence for the prosecution and defence such as is prescribed by the words of s. 255 of the Criminal Procedure Code; it was rather as I read it a sustained effort at persuasion, and there was no real endeavor made by the Sessions Judge to present the evidence on the one side and the other, both impartially before the jury. If I may be allowed to say so I think that this error probably proceeded from the adoption of the narrative form of charge. It is impossible, I imagine, to put a case to a jury in the narrative form from beginning to end with complete fairness to both sides without giving the narrative a double shape, i.e., stating it, so to speak, in the alternative, and I apprehend that very few persons indeed are able to do this with any great degree of success. It is no doubt most useful, because it saves time, that the Judge should state to the jury in the narrative form so much of the facts as are admitted on both sides. But when he has reached this point, it is best I think that he explain distinctly the issues of fact which it remains for the jury to determine having regard to that part of the case which is admitted and to the charges upon which the prisoners are tried; and, having made the jury understand these issues, the more convenient mode of summing up for him to adopt is, in my judgment, to present to the jury as clearly and impartially as he can a summary of the evidence and the considerations and inferences to be drawn from the evidence, as they bear both on the negative and affirmative sides of each of these issues. It is impossible of course for any Judge to state every item of evidence, or to draw the attention of the jury to every fact which has been deposed to, but he can, without difficulty, give them a summary of the leading points of the evidence and the considerations and inferences to be drawn from it on the one side and on the

(1) B. L. R., Sup. Vol., 459.

other. He may if he thinks fit, under the last clause of s. 256, at the same time express to the jury his own opinion as to the facts: but that is a very different thing indeed from that which the Sessions Judge has done in this case. The Judge has not, as I read his charge, simply expressed his opinion, and then left all the evidence fairly before the jury on the one side, and on the other, for them to Judge of it by the aid of his opinion if they chose to avail themselves of it. But he has endeavoured, I think—that at any rate is the impression which his charge is given me—from first to last, to persuade the jury to take the particular view of the facts and of the inferences from the evidence which he himself has taken and drawn, and indeed he has left them no loop-hole for taking any other view. This is not only not in accordance with the enactment of the code of criminal Procedure as I understand it, but I think it is a course calculated in the mofussil to withdraw altogether from the jury the actual decision of the case. Probably, in other tribunals than a mofussil Sessions Court, it might lead to exactly the opposite result to that which I suppose was desired by the Sessions Judge, that is, it would, in such a case as the present, lead to the opposite view being adopted by the jury, and so would cause an acquittal to become instead of a conviction. I concur with the decision pronounced by Kemp, J.

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—X—Act XI of 1859— <i>Sale in Execution of State of Deceased—Decree Inter Partes.</i>] A sued, under Act X of 1859, the widow of Z, as widow of Z and guardian of Z's son, for arrears of rent due dy Z. He obtained a decree in 1862 against the widow as Z's representative, but it was declared that Z's son was not liable on the ground that he had been adopted into another family. In a regular suit, A obtained a decree declaring Z's son to be the heir of	

his natural father Z. Certain estates of the deceased were then, in 1867, put up for sale under Act XI of 1859, in execution of A's decree for rent, and A became the purchaser. The certificate stated that the sale was of the right and interest of the widow, and that it took place under the decree in the regular suit. B, the holder of a prior decree for rent against Z, having failed to obtain execution against the same property, then sued A and Z's son for a declaration that he was entitled to sell the property on the ground that it had come to Z's son as Z's heir, and that only the interest of the widow (who had no interest) had been purchased by A. *Held* (reversing the decision of the High Court) A was entitled to the property.

The case of *Issan Chunder Mitter v. Buxsh Ali Soudagur* approved of.

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_____, s. 6 ... App. 5

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_____, s. 1, cl. 9—*Del credere Agent—Breach of Contract.*] Where a broker was sued for a balance of account, his liability being based on the receipt of a *del credere* commission, *held* that the suit was for breach of contract within the meaning of cl. 9, s. 1 of Act XIV of 1859, and the period of limitation must be calculated from the date of the last item in the account. The contract not being in writing, the suit, which was brought, more than three years from such date, was barred.

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_____, s. 20 ... 258, 361

See LIMITATION.

____—1861—V, s. 17—*Order of executive Nature.*] The High Court, while considering that an order by a Magistrate professing to act under s. 17 of Act V of 1861 was illegal, refused to interfere, on the ground that the order was one of an executive nature.

IN THE MATTER OF THE PETITION OF ROHOMAN SIKKAR App. 4

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———, s. 38	394
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———1866—XX, s. 2	193
<i>See</i> JURISDICTION OF CALCUTTA SMALL CAUSE COURT.	
———, ss. 18, 50, 100— <i>Registration—Priority.</i> A mort- gaged a tank in 1859 to the plaintiff. The mortgage was never registered. A in 1867 sold the tank to C, and executed a deed of sale thereof. The deed of sale was duly registered, and C had been ever since in possession under it. The plaintiff sued A on his mortgage, and in that suit C intervened and was made a defendant. A did not appear in the suit. <i>Held</i> , that C having registered his deed of sale, and being in possession, his title was good against the plaintiff.	
<i>Girija Sing v. Giridhari Sing</i> distinguished.	
SOODHARAM BHUTTACHARJEE <i>v.</i> ODHROY CHUNDER BUNDO- PADHYA	380
———, ss. 49, 50— <i>Registration—Priority.</i>]	
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———1869—IV, s. 17— <i>Act XIV of 1859, s. 1, cl. 16—Obncurrent</i> <i>Judgments on Facts—Confirmation by High Court of Decree of</i> <i>District Judge.</i>] <i>Act XIV of 1859, s. 1, cl. 16</i> , does not apply to divorce suits.	
A decree of a High Court confirming the decree by a district Judge for dissolution of marriage reversed, so far as it affected the co-respondent and condemned him in costs. The circumstances of the case took it out of the general rule not to reverse the con- current findings of two Courts on a question of fact.	
WILLIAM HAY <i>v.</i> WILLIAM GORDON	301
———1871—VI, s. 22. <i>See</i> BENGAL CIVIL COURTS ACT.	
———VIII. <i>See</i> REGISTRATION ACT.	
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ALLUVION—*Diluvion—Accretion—Regulation XI of 1825, s. 4.]*

Where a chur formed in the middle of a river, and was settled with A, and by the recession of the river new land appeared, which was really a deposit on the ancient site of B's land, though adhering to the chur, it was held to be B's land.

The first rule established by s. 4, Regulation XI of 1825, does not apparently contemplate land other than that commonly known as alluvion *viz.*, land gained by gradual and imperceptible accretion, the *incrementum latens* of the Civil law. There is no express provision in the Regulation for the case of land which has been lost to the original proprietor by the encroachment of the sea or a river, and which, after diluviation, reappears on the recession of the sea or river, and there is nothing to take away or destroy the original proprietor's right; such a case is to be determined by the general principles of equity and justice under the 5th rule contained in s. 4.

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A title founded on the original ownership and identification of land reappearing is to be confined <i>prima facie</i> to the reformation on that site.	
The cases of <i>Mussamut Imam Bandi v. Hurgovind Ghose</i> , <i>Lopez v. Maddanmohan Thakar</i> , and <i>Eckowri Sing v. Hiralal Seal</i> commented on.	
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ATTORNEY'S COSTS—Lien on Sum recovered by Client—Attachment of Fund by creditor.] The plaintiff obtained a decree against the defendant; but before satisfaction of the decree, the amount of the decree was attached in the hands of the defendant by a third person who had obtained a decree in a suit against the plaintiff. On an application by the attorney for the plaintiff that the defendant might be ordered to pay to him his cost of suits out of the sum which had been attached in the defendant's hands, and on which the attorney claimed to have a lien, the Court held that the attorney had a lien for his costs on the sum so attached, but that the only order it could make was an order to the defendant not to pay the sum attached to any one without notice to the attorney.	
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BARRISTER—Suspension—Malus Animus.] An order of a High Court suspending a barrister from practice for five years set aside on the ground that, although there had been grave irregularity, there was no <i>malus animus</i> to show an intention to commit a fraudulent act.	
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_____, s. 52—Act X of 1859, s. 78—Discretionary Power of a Court to stay Execution of a Decree for Ejectment.] The Court has discretion to stay execution on other grounds than those on which it is bound to do so under s. 52 of Act VIII of 1869 (B. C.).	
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_____, s. 102— <i>Appeal to the High Court.</i>] In a suit for arrears of rent below Rs. 100, an appeal lies to the High Court from a decree passed in appeal by an Additional Judge.	
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_____, <i>Special Appeal.</i>] In suits for recovery of rent below Rs. 100, a special appeal lies to the High Court from the decision in appeal by a Subordinate Judge.	
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_____, CIVIL COURTS ACT (VI of 1871), s. 22— <i>Jurisdiction—Appeal—Execution—Act XXIII of 1861, s. 11.</i>] The appeal from an order of a Subordinate Judge directing execution to issue lies to the District Judge, and not to the High Court, where the amount claimed in a suit is under Rs. 5,000, although the amount sought to be recovered in execution has, by the addition of interest since decree, grown to a sum exceeding Rs. 5,000.	
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_____, ss. 62, 282— <i>Power of Magistrate—Breach of the Peace—Wrongful Act.</i>] Under s. 282 of Act XXV of 1861, a Magistrate can prevent a person from doing a wrongful act, but not one which the person may lawfully do. It was not intended that a person should be prevented by a Magistrate from exercising his rights of property, because another person would be likely to commit a breach of the peace if he did so.	
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<i>See</i> CHARGE OF JUDGE TO JURY.	
_____(Act X of 1872,) s. 296— <i>Power of a Sessions Court to order Committal of Accused discharged by a Magistrate.</i>] An order by a Judge, under s. 296 of Act X of 1872, directing a Magistrate to commit an accused person, who has been discharged at a preliminary enquiry, to take his trial in a Court of Session, must specify the particular act constituting the offence charged. The Judge cannot direct a committal for offences with which the accused was in no way charged before the Magistrate.	
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The words actually used by an accused, who is said to have confessed, ought to be ascertained. The Court should not except merely the conclusions at which the witnesses, deposing to a confession, themselves arrived from the answers which the accused gave to questions put by them.	
Where an accused makes two distinct statements,—the one amounting to a confession of guilt, the other repudiating guilt,—if the one statement is taken against the accused, the other also must be taken, for what it is worth, in his favor. The Court ought to weigh well the relative credibility of the two statements before it accepts the one in preference to the other.	
Documents which were in the record sent up by the Magistrate, but which were not put in evidence before the Session Judge; were looked at because they told in favor of the prisoner.	
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Execution of Document by Pundah Ladies—Agency—Burthen of Proof.] The plaintiff sought to make two pundah ladies liable on a document which he alleged had been executed by a third person as their agent. Held (reversing the decision of the High Court), strict proof of the agency must be given.	
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—, ss. 13, 21, CL. 1, & s. 32, CL. 7— <i>Relevant Fact—Evidence of Family Custom—Statement in Writing by a Party to the Suit who is dead—Admission.</i>]	
In a suit to establish the existence of a family custom, the plaintiffs offered in evidence a deed containing a recital that the custom of the family was as alleged in the plaint, and a covenant to do nothing contrary to it. The deed was executed before action brought by the present plaintiffs, and also by a plaintiff who had died since the institution of the suit and, as the plaint alleged, by “a considerable majority” of the family, but the defendant was not a party to it. Held, that the deed was admissible as evidence on behalf of the plaintiffs, though they could themselves be called as witnesses; but that, though admissible, the custom as against the defendant must be proved <i>aliunde</i> .	
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—, s. 24— <i>Confession under Threat made for purpose other than to extort Confession.</i>]	
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—, s. 30— <i>Confession of a Prisoner when admissible against Co-prisoner—Trial by Jury.</i>]	
To render the confession of one prisoner jointly tried with another admissible in evidence against the latter, it must appear that that confession implicates the confessing person substantially to the same extent as it implicates the person against whom it is to be used, in the commission of the offence for which the prisoners are being jointly tried.	
THE QUEEN V. BELAT ALI	453
—, ss. 30 & 133— <i>Confession of one Prisoner when admissible against another—Accomplice—Corroborative Evidence.</i>]	
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—, ss. 74 & 77— <i>Proceedings between the Same Parties in another Suit—Public Documents—Plaint—Written Statement—Judgment.</i>]	
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—, CORROBORATIVE	455 Note
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—, HOW TO SUM UP	App. 36
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See EVIDENCE ACT, ss. 13, 21, 32.	
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See APPEAL.	

EXECUTION—Security by Manager—Act VIII of 1859, ss. 232, 235, & 245, 248—272, 281—287—Attachment without Sale—Concurrent Orders for Attachment in different Districts.]		
The plaintiff, as manager of the estate of her husband, a lunatic, obtained a decree and attached and became the purchaser of the lands of the defendant in execution of the decree. The Judge required her to give security for the proceeds of the sale before he would allow actual possession to be given to her. The sale was confirmed, but several months elapsed before she found security, and meanwhile the same lands were attached and purchased by other creditors under another decree against the said debtor, and possession was given to them. <i>Held</i> (reversing the decision of the High Court), the title of the plaintiff must prevail. The security was ordered for the protection of the lunatic against misappropriation by his manager; it was not a proceeding affecting the judgment-debtor. The second sale ought not to have been ordered or confirmed.		
Under the Code of Civil Procedure, property may be attached without view to immediate sale.		
A Court has power to send its decree for concurrent execution into several places, although in its discretion it may refuse to exercise such power.		
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————. <i>See</i> ALIENATION BY DE FACTO ———.	
————— <i>Infant—Compromise—Burthen of Proof—Fraud—Re- versal of Concurrent Findings on Fact.</i>] It is not incumbent upon a guardian to contest every claim made against the infant's estate. The Judicial Committee, reversing the finding of the Courts below, refused to set aside a compromise (confirmed by a decree of Court) by the former guardian of the plaintiff of a claim against his estate for debt after sixteen years, the plaintiff having failed to prove that the suit was fictitious, and the compromise fraudulent and collusive.	
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————— AND INFANT— <i>Sale by Guardian—Delay in repu- diating a Guardian's Act—Ratification of Contract made by Guar- dian.</i>] Mere delay on the part of a ward, after attainment of majority, in repudiating an alienation made by his guardian, can- not be treated as a ratification of the guardian's act, but only as evidence of ratification.	
RAJ NARAIN DEB CHOWDHRY V. KASSEE CHUNDER CHOWDHRY	334
————— WARD— <i>Custody of Child—Act IX of 1861— Religion—Adoption of Mahomedan Religion for purpose of</i>	

<i>Marriage—Bigamy—Special Leave to appeal.]</i> A child, the offspring of a Christian marriage, was living after her father's death under the protection of her mother. A married man, a Christian, came to live with her mother, and, in order to legalize their intercourse, he and the mother became Mahomedans, and were married in Mahomedan form. About three years after, when the child had attained the age of fourteen, some of her relatives applied for and obtained an order, under Act IX of 1861 that the girl be removed from the guardianship of the mother and her second husband and placed under a Christian guardian. The girl deposed that she wished to remain with her mother and to become a Mahomedan. Special leave having been given to appeal to the Privy Council, the order was upheld.			
<i>Quære.</i> —Whether a marriage, according to Mahomedan rites, between a married Christian man and a Christian woman, both of whom became Mahomedans in order to effect the marriage, is valid.			
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<i>valued for purpose of giving Jurisdiction.]</i>			
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HINDU LAW— <i>Mitakshara—Inheritance—Succession.</i>] A brother's daughter's son succeeds as heir, under the Mitakshara, in the absence of nearer heirs.			
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HINDU LAW—Mitakshara—Son's Property—Alienation by Father—Obstructed Heritage.] In execution of a decree against A, a Hindu, living under the Mitakshara, his right, title, and interest in a certain property, part of which he had acquired as heir to his nephew and cousin, was sold. A suit brought by A's sons to obtain possession of their share of the property, on the ground that the debt for which the sale was held had not been incurred under a legal necessity, was dismissed so far as it related to the part of the property which A had inherited collaterally.

According to the Mitakshara, a son cannot prevent alienation by his father of property which the latter has inherited collaterally. The restriction upon the father's power of alienation only applies to the grandfather's property.

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Will—Disinheriting of Sons]
ROOPLALL KHETTRY V. MOHIMA CHURN ROY ... 271 Note

Gift absolute to Widow—Disinheriting of Sons.] A Hindu died, leaving a widow, two infant sons, and a daughter, and having made a will in English, of which the following is the material portion:—"I give, devise, and bequeath unto my wife LD and her heirs and assigns for ever all my real and personal estates and effects, and do appoint my said wife sole executrix of this my will." Held (reversing the decision of Macpherson J.) that the wife took an absolute estate with full power of alienating the property, and not merely as trustee and manager for the infant sons.

It is not necessary that there should be an express declaration of the testator's desire or intention to disinherit his sons if there is an actual gift to some other persons expressed in clear and unequivocal words.

PROSUNNO COOMAR GHOSE V. TARRUCKNATH SIKKAR ... 267

RESIDENT AND DOMICILED IN CALCUTTA, MAJORITY OF
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WIDOW—Alienation, Gift by—Reversioner—Practice—Heir—Sister's Son—Act VIII of 1859, s. 7—Mortgage by Widow—Burthen of Proof.] By the Mitakshara, a male descendant in the fifth degree from the great grandfather of the *propositus* succeeds to the exclusion of the sister's son.

A Hindu widow executed deeds of gift, in which her late husband's mother, the nearest reversioner, concurred. After the death of the widow, but in the lifetime of the mother, the next presumable reversioner sued to set aside the deeds and for possession. Held, that the suit was good so far as it sought to set aside the deeds; and the mother having died before decree, that no objection could be taken to the suit on the ground that the decree gave possession to the plaintiff.

Such suit was held to be no bar to a second suit by the same plaintiff to set aside a mortgage by the widow and the mother of the deceased of a portion of the property which was the subject of the first suit, although in that suit the property was described as subject to the mortgage, and the name of the mortgagee was mentioned. The true test of the application of s. 7 of Act VIII of 1859 is whether there has been a splitting of the cause of action.

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The burthen of proving the necessity for a mortgage by a Hindu widow rests on the mortgage, where that necessity is disputed by the next heir.	
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JURISDICTION—*Letters Patent, 1865, cl. 12—Act VIII of 1859, s. 5—Suit for Land—Nuisance—Acts done under Powers conferred by the Legislature—Reg. I of 1824—Act XLII of 1850—Land taken for public Purposes—Injunction—Decree—Time to abate Nuisance—[Liberty to apply.]* The plaintiffs, the owners and occupiers of a house and premises in Howrah, sued for an injunction to restrain a nuisance caused by certain workshops, forges, and furnaces erected by the defendants, and for damages for the injury done thereby.

The defendants were a Railway Company incorporated under an Act of Parliament for the purpose of making and maintaining railways in India, and by an agreement (entered into under their Act of Incorporation) between them and the East India Company, they were authorized and directed to make and maintain such railway stations, offices, machinery, and other works (connected with making, maintaining, and working the railways) as the East India Company might deem necessary or expedient. The workshops complained of were erected in 1867 under the sanction of the Bengal Government on land purchased by the Government in 1854 for the purposes of the railway under Regulation I of 1824 and Act XLII of 1850, and which had been made over to the defendants.

Held, that the suit was *in personam*, and not a suit "for land or other immoveable property," within the meaning of cl. 12 of the Letters Patent, 1865, or of s. 5 of Act VIII of 1859.

Held further, a nuisance having been proved to exist, that is to say, such annoyance as materially interfered with the ordinary comfort of human existence in the house and caused sensible injury to the property of the plaintiffs, the defendants could not plead laches or acquiescence on the plaintiffs' part, as, upon the plaintiffs complaining in May 1870, the defendants had admitted that there was a nuisance, and had up to June 1871 made various efforts to abate it. Nor could the defendants escape liability on the ground that the nuisance had been caused by them in the reasonable exercise of powers conferred upon them by the Legislature.

An injunction was granted restraining the defendants, and liberty to apply was reserved in the decree. On a motion by the defendants, supported by an affidavit showing the alterations which they proposed to make with the view of abating the nuisance, and alleging that a period of three months was required to carry out these alterations, and that a refusal to grant this time would necessitate the closing of the Company's workshops, and would occasion great inconvenience, the Court granted the time asked for, on the conditions that the defendants paid the costs of the application, and did all they possibly could in the mean while to prevent annoyance to the plaintiffs.

RAJ MOHUN BOSE V. THE EAST INDIAN RAILWAY COMPANY ... 241

CLAIM UNDER VALUED FOR PURPOSE OF
GIVING ... App. 20

See HIGH COURT ACT, s. 15.

OF BRITISH MUNICIPAL COURT—*Act of State—Title to Timber—Confiscation by Governor of Foreign State—Measure of Damages.* The plaintiff brought a suit at Tonghoo in British Burmah to recover possession of certain timber, which he alleged the defendants had wrongfully and in collusion with the Burmese Governor of Ninghan, taken out of his

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possession in foreign territory and removed to Tonghoo. The defendants stated that they had acquired the timber from the Governor of Ninghan in terms of an agreement between them and the Burmese Government. It appeared that the Governor of Ninghan had confiscated the plaintiff's timber in contravention of a royal mandate. After the institution of the suit, the defendants removed the timber from Tonghoo to Rangoon. <i>Held</i> , that a British Municipal Court might enquire into the character of the act of the Governor of Ninghan, and was not bound to accept it as an act of State.	
The Court below having fixed the price of the timber at Rangoon as the alternative damages in case of non-delivery, the High Court refused to interfere with such award.	
THE BOMBAY BURMAH TRADING CORPORATION, LIMITED, v. MIRZA MAHOMED ALI SHERAZEE	345
JURISDICTION OF CALCUTTA SMALL CAUSE COURT— <i>Act IX of 1850, s. 28—Act XXVI of 1864, s. 2—Sum added to legal Claim for purpose of giving Jurisdiction.</i>] A plaintiff cannot give jurisdiction to the Small Cause Court by adding to his claim sums which he could not, under any circumstances, be entitled to recover.	
<i>Sikhur Chund v. Sooringmull</i> distinguished.	
BONOMALLY NAWN v. CAMPBELL	193
HIGH COURT— <i>Cause of Action—Promissory Note—Letters Patent, 1855, cl. 12.</i>] The High Court has no jurisdiction to entertain a suit brought upon a promissory note made without, but payable within, the local limits of its jurisdiction, leave to institute the suit not having been first obtained.	
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LANDLORD AND TENANT— <i>Ejectment of a Ryot—Onus Probandi.</i>]	
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<i>See REMOVAL OF SUIT FROM MOFUSSIL COURT.</i>	
LIABILITY, DEFENDANTS WITH SEPARATE	259, Note
<i>See LIMITATION.</i>	
LIBEL— <i>Plaint, Rejection of—Ironical Publication—Comment in Newspaper.</i> On the presentation of a plaint for libel, the Court must see whether the alleged libellous matter set out in the plaint is really libellous; if it is not, there is no ground of action and the plaint ought not to be admitted.	
If the words which are set out in the plaint are not a libel, the plaint cannot, by alleging that they were printed and published by the defendant with the intent to injure the plaintiff, and bring him into public scandal and disgrace, and to expose him to public scorn and ridicule, and to cause it to be suspected that the plaintiff was a dishonest person, and had been actuated by sinister and fraudulent motives, make them a libel; nor can the plaintiff by alleging that word are spoken ironically make them libellous if they do not appear to the Court to be so.	
<i>F. F. WYMAN v. A. BANKS</i>	71
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<i>See JURISDICTION.</i>	
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—— ON SUM RECOVERED BY CLIENT	444
<i>See ATTORNEY'S COSTS.</i>	
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<i>See RELIGIOUS ENDOWMENT.</i>	

_____*Act XIV of 1859 ss. 19, 20—Execution of Decree—Courts established by Royal Charters—Proceedings to enforce Decree.* Where the High Court passes a decree on appeal from a Mofussil Court, the Court which has to execute the decree of the High Court is governed by the rules which govern the execution of its own decrees.

An appeal prosecuted to a decree is a proceeding to enforce a decree within the meaning of s. 20 of Act XIV of 1859. Also held there was such a proceeding where, on the judgment-debtor seeking to obtain leave from the High Court to appeal to the Privy Council, the execution-creditor intervened.

The ruling in *Chowdhry Wahid Ali v. Mullick Inayat Ali* that, whether the decree of the lower Court is reversed, or modified, or affirmed, the decree passed by the Appellate Court is the final decree in the suit, and as such the only decree which is capable of being enforced by execution, not dissented from, except that it was

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suggested that in all cases it may be expedient expressly to embody in a decree of affirmance so much of the decree below as it is intended to affirm' and thus avoid the necessity of a reference to the superseded decree.

Quere.—Can the ruling in *Anundmayi Dasi v. Purno Chandra Roy* be supported?

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LIMITATION—*Act XIV of 1859—Proceeding to enforce Decree—Application for Review.*] An application by a decree-holder for a review of judgment is not a proceeding to enforce his decree within s. 20 of Act XIV of 1859.

MUSUMAT BIBEE LUTTEPUN V. RAJROOP SING ... 361

— *Execution—Decree—Act XIV of 1859, s. 20.*] Where a decree was given for arrears of rent against two persons, and one of them was afterwards declared on appeal to be liable for the rents for a certain period only, and execution was taken out against him only, *held* that the decree must be taken as a separate decree against each defendant for the portion for which each was declared to be liable, and consequently that execution-proceedings against one would not prevent the law of limitation applying to bar execution against the other.

WISE V. RAJNARAIN CHUCKERBUTTY ... 258

— *Execution of Decree against several Defendants with separate Liability.*]

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— **POWERS OF SESSIONS JUDGE TO ORDER COMMITTAL OF ACCUSED DISCHARGED BY MAGISTRATE** ... 285

See CRIMINAL PROCEDURE CODE, s. 296.

MAHOMEDAN LAW ... App. 33
See MAINTENANCE, ORDER FOR.

— *Dower—Lien—Reversal of concurrent Findings on Fact.*] Where the widow of a Mahomedan obtained actual and lawful possession of the estates of her husband under a claim to hold them as one of the heirs and for her dower, it was *held* that she was entitled to retain possession until her dower was satisfied, with the liability to account to those entitled to the property subject to the claim for the profits received.

The Courts below, without ascertaining the amount of the widow's dower, decreed possession of the estates to the heirs. Such decree was reversed on appeal, and the amount of dower was ascertained.

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MINOR, CONTRACT BY— <i>Delay in repudiating—Ratification.</i>	
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MONEY-DECREE IN SUIT FOR FORECLOSURE OR SALE— <i>Effect of Note appended to Decree varying Decree—Practice—Affidavit filed after Adjournment for Convenience of Counsel, Admissibility of.</i> A mortgagee sued for foreclosure or sale in the usual form. The suit was undefended. The plaintiff elected to take a simple money-decree against the mortgagor. The following words were appended to the decree:—"Note.—The equity of redemption in the property comprised in the mortgage is not liable to attachment and sale under this decree." After ineffectual attempts to realise his debt, the plaintiff applied to the Court for liberty to sell the mortgaged premises. <i>Held</i> , that the Court had a discretionary power to grant or refuse the sale. The note at the end of the decree did not amount to an absolute prohibition against the sale, but was merely meant as a guide to the Court which should have to execute the decree, and to show that execution should not issue against the equity of redemption, except by special leave of the Court.	
The Court made an order as if there had been a decree for sale in the first instance, except that the account was to be treated as a final account at the date of the decree.	
NEERUNJUN MOOKERJEE V. OOPENDRO NARAIN DEB	57
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MOONSIFF, DISMISSAL OF— <i>High Court—English Committee—Jurisdiction.</i>]				
A Moonsiff having been dismissed by an order of the English Committee, consisting of four Judges of the High Court, applied to a Division Bench, consisting of the Chief Justice and Mitter, J., to reconsider his case. The Chief Justice having dismissed his application, while Mitter, J., considered that he was entitled to a rehearing, he appealed under cl. 15 of the Letters Patent. The Court considered it unnecessary to enter into the merits of the questions raised, and held that the Moonsiff having been removed by an order of four Judges forming the English Committee, no Division Bench had any power to reconsider, or review, or set aside, or to order the Judges of the English Committee to reconsider, review, or set aside the decision of the English Committee.				
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<i>See</i> HINDU WIDOW.				
MORTGAGE IN POSSESSION— <i>Account—Regulation XV of 1793.</i>]				
In taking the accounts as between a mortgagor and a mortgagee in possession, the interest may be set off from time to time against the rents and profits, the mortgagee only accounting to the mortgagor for any rents, profits, and interest on the same which he may have received over and above the interest due to him upon the debt.				
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PARTNERSHIP—*Payment of Debt out of Profits—English Law.*]

Although a right to participate in the profits of trade is a strong test of partnership, and there may be cases where, from such participation alone, it may, as a presumption, not of law but of fact, be inferred, yet whether that relation does or does not exist must depend on the real intention and contract of the parties.

To constitute a partnership, the parties must have agreed to carry on business and to share profits in some way in common; but where a contract is entered into between partners and a third person for the protection of that person as a creditor, whereby it is agreed that he shall receive in consideration of advances commission on the net profits of the partnership business, and large powers of control over the business are given to him, but no power to direct transactions, the Court, if satisfied that the contract was one of loan and security, will not interpret it as constituting a partnership.

In applying the English law of partnership to cases in India, the usages of trade and habits of business of the people of India, so far as they may be peculiar and differ from those in England, ought to be borne in mind,		
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Where tiled huts had been seized under a decree of the Small Cause Court, and a third party interpleaded under s. 88 of Act IX of 1850, and claimed the huts, *held*, that the Court having no power to seize the huts was right in dismissing the claim.

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